

QUESTION PRESENTED

Under what circumstances may the state force a prison inmate to forego observance of a central tenet of his religious faith.

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OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey, dated October 15, 1984, is reported at 595 F. Supp. 928 (D.N.J. 1984) and appears in the Appendix to the Petition for Writ of Certiorari (P.A. 39A-55A).[1]

The opinion of the United States Court of Appeals for the Third Circuit, sitting en banc, dated January 27, 1986, vacating the judgment of the district court and remanding this matter for reconsideration, is printed in P.A. 1A-38A, and is reported at 782 F.2d 416 (3d Cir. 1986).

JURISDICTION

The case was argued before the United States Court of Appeals for the Third Circuit on June 21, 1985. The case was reargued before the Court en banc on November 12, 1985 and was decided on January 27, 1986. The petition for a writ of certiorari was timely filed and the writ was granted on October 14, 1986. 55 U.S.L.W. 3247. Petitioners invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

1. The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part:

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[1] As used herein, "P.A." refers to the Appendix attached to the Petition for Writ of Certiorari, followed by the page number; "J.A." refers to the Joint Appendix, followed by the page number; "Tr." refers to the transcript of the proceedings before the district court, followed by the page number; "P. Br." refers to Petitioners' Brief, followed by the page number; "S. Br." refers to the amicus curiae brief filed by the Solicitor General, followed by the page number.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

3. Title 42 U.S.C. § 1983, provides as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Respondents Mateen and Shabazz, two incarcerated inmates at Leesburg State Prison ("Leesburg"), Leesburg, New Jersey, brought this action under 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey (J.A. 6-19). The inmates, members of the Islamic faith, challenged the institution's decision in March of 1984 to discontinue a practice of the previous five years. The prior practice allowed all inmates to attend Jumu'ah, an obligatory Muslim Sabbath worship service, occurring each week on Friday at approximately noon, and lasting for about one hour. Although the change in the institution's policies still permitted maximum security inmates, those who pose the greatest threat to prison security, to attend Jumu'ah, it effectively barred all other inmates from attending this holy Sabbath worship service (*Id.*).

Both Shabazz and Mateen have been practicing members of the Islamic faith for many years (Tr. 18, 40).[2] Petitioners conceded the sincerity of the religious beliefs of both inmates (P.A. 40A).

Petitioners are Edward O'Lone, who at all relevant times was the Chief Executive Officer at Leesburg (Tr. 149); James A. Ucci, Director of Custodial Operations at Leesburg (Tr. 49); and William H. Fauver, Commissioner of Corrections for the State of New Jersey.

Leesburg (hereinafter referred to as "the main facility") is a medium security institution, located on approximately 1100 acres of land. The institution is comprised of the main prison building and two geographically separate minimum security satellite units, the Farm and the Ancora Unit. The main prison houses inmates who are classified as either maximum security or as gang minimum custody status (Tr. 59; P.A. 40A). The Farm only houses inmates with full minimum custody status.

Prisoners at Leesburg are initially classified upon entering the facility as being maximum, gang minimum, or minimum security risks. Inmates assigned maximum custodial status are considered the greatest security risks, and are consequently not eligible for furlough, work release, or work detail in areas outside of the prison compound and must be incarcerated within the prison complex (Tr. 23, 166; J.A. 146-147). Gang minimum is an intermediate custodial status between maximum and minimum. Inmates initially classified as maximum may be promoted after a specified period of time to gang minimum security status and are permitted to work on certain outside work details (Tr. 23, 54, 166; J.A. 147).

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[2] Mr. Shabazz was a member of the Islamic faith since 1973, and Mr. Mateen since 1977 (Tr. 18, 40). As a Muslim, Mr. Mateen has been a prayer instructor, handler of the Jakat which is the charitable tax that Muslims are required to pay, and has acted as an Assistant Imam and as Imam (one who leads the community in Islamic religious obligations) at Trenton State Prison (Tr. 19; J.A. 30).

Inmates classified as full minimum are relocated to the Farm or Ancora Unit. The Farm is physically separate and geographically distinct from the main facility (Tr. 10, 113, 119). Unlike the main institution, which is surrounded by a 12 foot high fence topped with barbed wire, the Farm is an open area, without a wall or a fence, and prisoners may enter and exit the Farm without passing through the receiving gates for the main facility (Tr. 59, 104, 119, 129; P.A. 46A). Those minimum security inmates are assigned to outside work details and all are eligible to work outside of the institution with minimal supervision (Tr. 52, 54; J.A. 147).

Leesburg initiated the outside work detail program in April, 1983, in conjunction with a revised New Jersey Department of Corrections policy. The policy stipulated that inmates could not be transferred directly from maximum security to minimum security custodial status, but instead must pass through an intermediate, or gang minimum status (Tr. 166-169; J.A. 146-147).[3]

Prior to March 7, 1984, all Muslim inmates at both the main facility and the minimum units, even those who since April, 1983, had been assigned to outside work details, were able to attend Jumu'ah, the Muslim Sabbath worship service. Jumu'ah services are held every Friday at Leesburg, with separate services conducted for inmates housed in the main facility and on the Farm (Tr. 26-28; 96-97). The service lasts approximately 45 minutes to an hour (Tr. 101-102).

Jumu'ah, which literally means the day of gathering or day of assembly is an obligatory prayer, required of each Muslim,

[3] This Department of Corrections policy, standard 853 is entitled "Eligibility Criteria for Reduced Custody Consideration." It was a standard promulgated by the State of New Jersey, had no impact on attendance at Jumu'ah, and was designed to be "a framework within which Classification Committee shall exercise their (*sic*) discretion and their (*sic*) decision making responsibilities." (J.A. 146). New Jersey has always had classification standards, and the major difference between this standard and its predecessor was the requirement that time spent in gang minimum is a prerequisite to full minimum status (Tr. 167).

which must be performed in a congregation every Friday. The service may only be said during a limited number of hours on Friday and normally occurs around noon (Tr. 35-36; P.A. 43A). It cannot be held after inmates return from work (J.A. 38). Unlike other Muslim prayers which can be made up individually, Jumu'ah cannot be made up and must be performed in congregation (P.A. 3A, 43A; Tr. 21-22; J.A. 31-33).

Jumu'ah is regarded as the most important weekly service in the Muslim religion, and the obligation to attend the Jumu'ah worship service is commanded in the holy Qur'an, which is the central book of the Muslim religion and sets forth its basic tenets and principles (J.A. 31-33; Tr. 21-22; P.A. 43A). The district court found, and petitioners do not dispute, that Jumu'ah is "the central service of the Muslim religion" and "is comparable to the Saturday service of the Jewish faith and the Sunday service of the various Christian sects." (P.A. 43A).

Mateen testified that Jumu'ah services had been conducted on a regular basis at Leesburg for at least the past five years (J.A. 35; P.A. 43A; Tr. 26). Prior to March 7, 1984, those gang minimum Muslim prisoners who wished to attend Jumu'ah and who were housed at the main facility and assigned to outside work details during the week, were allowed to remain in the prison and work on an alternate detail on Friday so that they could attend the Muslim congregational worship service (Tr. 11, 26, 68, 105).[4]

Until March of 1984, Mateen worked on an outside detail four days a week, but on Friday he was one of between 11 and 22 other Muslims on outside details who were assigned an alternate detail on the prison grounds so that they could attend the Jumu'ah service (Tr. 26). On Friday, Mr. Mateen was reassigned to the wood sawing detail, which cut wood to a specified length and measurement (Tr. 26-27, 209). He stated that there was always work available (Tr. 27). Petitioner O'Lone also

[4] Any inmate inside the main facility, regardless of security classification, was eligible to attend the Jumu'ah service.

testified that the prison had sold $40,000 dollars worth of cut wood the previous year (Tr. 153).

In March of 1984, without warning or explanation, petitioners changed the alternate Friday wood sawing detail from gang minimum to maximum, so that Mateen was no longer able to remain in the main facility on Friday to attend the Jumu'ah service (Tr. 68, 70). Petitioners offered no reason for this sudden elimination of the alternate work detail for Muslim inmates on Friday, other than the rationale that this work was subsequently assigned to maximum security inmates.[5] Indeed, when asked about this change, James Ucci, Chief Deputy at Leesburg stated:

> The Court: Tell me why you, after March of 1984, this notice, you were unable or it was not considered wise to continue to permit plaintiffs such as these to stay in, as you had permitted before that time, to stay inside the prison on Friday and go to Jumu'ah? Tell me again, what's the reason for that?
>
> The Witness: Well, for one, they are assigned to a work detail, which work is required.

[5] As we explain *infra*, on March 7, 1984, petitioners issued a new policy directive requiring that all gang minimum and full minimum inmates remain at their outside work assignments throughout the day and not be permitted to return to the institution for any reason. Since gang minimum inmates had been working on an alternate work detail on Friday on the grounds of the institution, this March 7, 1984 directive and the myriad of reasons which petitioners advance for its adoption (P. Br. 10-12), were totally irrelevant to gang minimum Muslim inmates. For these inmates, the relevant policy change preventing their attendance at Jumu'ah was petitioners' unexplained change of the alternate Friday work detail from gang minimum to maximum.

According to the work detail records that were supplied by petitioners, there are a total of 47 work details, 10 of which involve work outside the main facility. Approximately 125 prisoners were ordinarily assigned each week to outside work details during 1983-1984. These records show that there are many jobs inside the institution which could be used for alternate work details on Friday so that lesser security risk Muslim inmates could continue to attend Jumu'ah worship. (J.A. 62-120). Moreover, petitioner Ucci admitted that if the Muslim inmates presently at the Farm worked inside the institution on Friday in order to attend Jumu'ah, there would be sufficient available manpower to staff all of the outside work details as well as to provide work assignments for Muslim inmates (Tr. 139-141).

> The Court: Well, they were assigned to a work detail before and they were allowed to stay in on Friday.
>
> The Witness: But that detail is no longer in existence.
>
> The Court: Why not?
>
> The Witness: Because we put maximum inmates there and we moved the gang minimum inmates outside the institution. That's a maximum detail. That detail is inside the wall now, or fence.
>
> The Court: Well, isn't that bootstrapping? You say, well, we can't allow them to stay in after March of 1984 because they're not max and they're—we made them max inside. Well, they can't come in because of what you did after March of 1984 (Tr. 70).

Prior to March 7, 1984, there is no evidence of any problems or inmate resistance because Muslim prisoners were permitted to work on an alternate detail in order to attend the Jumu'ah service (Tr. 104-105). Indeed, petitioners concede that Muslim inmates at the institution constitute no greater disciplinary problem or security risk than other inmates at the prison (Tr. 138-139).

Nor is there any evidence that the congregational worship service posed a threat to the security of the institution or any other prisoner, or was a motivating factor in petitioners' decision to bar gang minimum inmates on outside work details from attending the service. On the contrary, the service continues to be held, but is attended at the main facility exclusively by maximum security inmates.[6]

[6] Petitioners contend that allowing gang minimum inmates to work on an alternate work detail one morning per week would contravene Standard 853 which requires these inmates to move outside of the security perimeter (J.A. 147). Nothing in the language of Standard 853 supports such an interpretation (*id.*). Moreover, the prison allowed gang minimum inmates to participate in this alternate work detail for 11 months before its discontinuation, and there is no indication that this practice was considered violative of Standard 853.

Moreover, there is no evidence that this alternate work detail and subsequent attendance at Jumu'ah posed any affinity group problems. Indeed,

Prior to March 7, 1984, Muslim inmates housed on the Farm (the minimum security unit), who were assigned outside work details and wished to attend the Muslim Sabbath worship service, reported to their regular work assignment on Friday and were permitted to return by themselves to the Farm to worship (J.A. 36-37, 39; Tr. 27-28, 68, 210-211).

On March 7, 1984, petitioners O'Lone and Ucci issued a new policy directive which stated that "[d]ue to the increase of the size of the outside details at both the Medium and Minimum, once an inmate goes to work in the morning, he will remain on his detail throughout the day." The memo permits inmates to return in the case of emergencies.[7]

Muslims have been holding worship services at Leesburg for five years (Tr. 26), may meet with their Imam as often as they wish (Tr. 92, 182-183), and are entitled to eat and pray together during the thirty days of Ramadan (J.A. 137-145). Most importantly, the alternate work detail existed for 11 months without incident.

Finally, the evidence shows that despite petitioners' protestations to the contrary, between August 1983 and April 1984, the population at the main facility declined from 754 to 691 inmates (J.A. 122-134). A comparison of population as of July 30, 1983 and April 30, 1984, shows that the population at the entire institution was virtually identical (J.A. 122, 134).

[7] Despite the representation made in the prison's March 7, 1984 memo, the prison records show that at least in the main prison facility, both the number of outside work details and the number of prisoners assigned to these outside work details declined immediately before and after the March 1984 policy change. Thus, the evidence indicates that the peak period for outside work details was November 1983 and that the number of inmates involved has declined substantially thereafter. Both petitioners Ucci and O'Lone admitted that the size of the outside details had not increased. More specifically, as of November 17, 1983, there were 156 inmates assigned to 11 outside details. Since that date, the numbers indicate a constant decline, as by December 15, 1983, there were 10 details and 141 inmates, on February 3, 1984, 137 prisoners assigned to 10 details, and by March 2, 1984, five days before the change in policy, there were only 124 inmates assigned to 8 outside details. After the March 7 policy changes, the numbers dropped even further. On March 9, there were 106 inmates assigned to 8 details, on April 20, only 90 prisoners and 7 details, and by June 1, 1984, only 86 inmates assigned to outside details, almost 50 percent fewer inmates than were assigned six months previously (J.A. 136-137; Tr. 81; 110-111; 199). Petitioners Ucci and O'Lone conceded that the size of the outside work details had not increased (Tr. 110-111; 199). Thus, the state's own statistics contradict the purported justification for the March 1984 policy change.

Because virtually all minimum inmates at the Farm were being assigned outside work details, this policy change precluded minimum inmates from returning for Jumu'ah.[8] Furthermore, because petitioners in March 1984 discontinued the alternate work detail for gang minimum inmates, thus precluding their return for congregational worship, these policies resulted in preventing both gang minimum and minimum inmates from participating in the Jumu'ah worship service. Ironically, inmates in maximum custody status, prisoners who are considered the greatest security risk and must be assigned an inside work detail, are still able to attend the Jumu'ah worship service.

Although petitioners contend in their brief that the March 7, 1984 policy change was effectuated to reduce congestion at the receiving gate at the main facility (P. Br. 10-12), no gang minimum prisoners from the main facility ever returned for Jumu'ah through that gate because they were assigned to an alternate detail on Friday inside the prison. Thus, any security

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[8] Ironically, First Amendment rights of minimum inmates are largely dependent upon how many feet they happen to work from the Farm buildings. (Tr. 97, 123-124. 126, 128). Thus, at the minimum unit, many inmates on outside work details work within the prison compound of 1100 square acres. These prisoners currently are not allowed to worship at the Jumu'ah service, regardless of the actual location of their work details. Many of these work details are as little as 5/10 to 7/10 of a mile from the prison buildings (Tr. 67, 121, 148, 204). However, minimum security prisoners officially on inside details, who in fact work outside of the prison building (but apparently closer to the building than prisoners on an outside detail), are allowed to attend Jumu'ah worship (Tr. 31, 97, 123-124, 126).

In addition, petitioners also testified that approximately 50 minimum security inmates work several miles from the prison complex on a highway work detail (Tr. 142). A few other inmates on outside work detail *occasionally* must travel several miles from the prison complex as part of their duties. Many full minimum inmates work in details much closer to the Farm (Tr. 148). Moreover, petitioner Ucci conceded that given the large population at the Farm and the small number of practicing Muslims, if the inmates who wished to attend Jumu'ah worship on Fridays were assigned to the compound, there would be sufficient number of inmates to cover the highway and other outside details as well as to provide work assignments for Muslim inmates. (Tr. 139-141).

or traffic congestion problems which may have resulted from the prison's prior policy relating to return to the main facility from an outside work detail were wholly unrelated to Muslim attendance at the Jumu'ah service.

Prisoners who returned to the minimum security unit at the Farm to attend Jumu'ah worship walked into the minimum security unit on their own, and they were not checked or strip searched (Tr. 27-28, 210-211). Petitioners conceded that there were no traffic congestion problems at the Farm caused by inmates returning for Jumu'ah or for any other reason (Tr. 104, 118-120, 129). Any congestion problems which may have existed at the main facility and prompted the March 7, 1984 policy change, were not caused by and were wholly unrelated to conditions at the minimum security units (Tr. 104, 118-120, 129).

The district court found, and petitioners do not dispute, that congestion at the main gate in particular and security in general "does not account for the prohibition on full minimum prisoners returning to the Farm during the day, since these prisoners do *not* have to pass through the gate to enter the Farm unit." (P.A. 46A) (emphasis in original). Rather, according to the district court, the prohibition on return for Jumu'ah by minimum inmates is based upon the goal of rehabilitation that "in order for prisoners to be ready to undertake careers in the free society, they would have to learn to work a full, productive day without taking off from their jobs to pursue personal matters." (P.A. 46A).

In addition to the work details operating Monday through Friday, there are also outside work details which operate six or seven days each week, resulting in some gang minimum inmates working on Saturday and/or Sunday. Although prison guards are available to supervise these weekend work details (Tr. 141, 193-194), petitioner O'Lone testified that additional weekend work "would be met with extraordinary resistance from the officers . . . who have a traditional expectation in

some regards of a Monday through Friday work week." (Tr. 179).

No inmates practicing other religions have been forced to forego their weekly Sabbath services (Tr. 111-112, 192-193).[9] Petitioners admitted that if a Muslim inmate failed to report to work on Fridays in order to attend Jumu'ah, the inmate would have been disciplined for such misconduct (Tr. 112-113; 174). Petitioner O'Lone testified that an inmate may not remain in maximum custody status in order to attend Jumu'ah (Tr. 177).

The American Muslim Mission, to which respondents belong, encourages inmates to work within the system and to respect authority (Tr. 212). In addition, Muslims in the main facility congregate with their Imam on Wednesdays, and Muslims on the Farm can congregate without their Imam for Jumu'ah and other purposes (Tr. 182, 195-196). Petitioners offered no evidence that the Jumu'ah congregational worship services posed any security problem for the institution, that Muslim religious activities threatened prison authority or other inmates, or that Muslims were more dangerous than any other inmates (Tr. 92-95, 138-139, 182, 195-196).

Pursuant to 42 U.S.C. § 1983, inmates Shabazz and Mateen filed a *pro se* civil rights Complaint in the United States District Court for the District of New Jersey. Shabazz and Mateen alleged that petitioners, in changing their policies in March of 1984 to deprive Muslim prisoners of their prior right to attend Jumu'ah, the Muslim Friday Sabbath service, abridged their First Amendment right of the free exercise of religion and violated the Fourteenth Amendment, by denying them rights afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, respondents contended that petitioners made no effort to explore the readily available alternatives which would both accommodate the inmates' com-

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[9] Petitioner Ucci could not recall if inmates had to work on Good Friday (Tr. 191). He further testified that on Christmas, if it fell during the week, most gang minimum and minimum inmates are given the day off (Tr. 192-193).

mands of conscience and constitutional rights, while protecting the institution's legitimate concerns (J.A. 6-19).[10] Shabazz and Mateen sought a declaratory judgment that petitioners' policies and practices violated their rights under the United States Constitution; a preliminary and permanent injunction prohibiting petitioners from changing the Jumu'ah worship service to another day or time, or from preventing respondents "or any other Muslim assigned to an outside work detail" from attending Jumu'ah worship; and compensatory and punitive damages.[11]

The district court appointed an attorney and held a hearing on an order to show cause why a preliminary injunction should not issue restraining the prison officials from barring respondents' attendance at their only Sabbath service. The parties agreed pursuant to *Fed.R.Civ.P.* 65(a)(2) to consolidate the application for preliminary and permanent injunctive relief.

The district court found no constitutional violation (P.A. 39A-55A). The district court conceded that petitioners' changes in policies constitute the "most restrictive alternative"

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[10] Respondents in their *pro se* Complaint alleged that they were told by petitioner Ucci the "the incident that had happened at Southern State Prison showed that [Ucci] had the authority" to prevent Muslims on outside work details from returning for Jumu'ah (J.A. 16). The incident referred to a suit which was decided in February 1984, involving Southern State Correctional Facility, which is a separate prison on the 1100 acre Leesburg complex. In that case, captioned *Thomas* v. *Edmiston*, Civil Action No. 83-4903 (D.N.J. February 17, 1984), in an unreported decision, the United States District Court for the District of New Jersey held that it was not a constitutional violation to prevent Muslim inmates from praying in the fields while they were on outside work details. Seventeen days after this decision, petitioners prohibited all gang minimum and minimum inmates at Leesburg from attending Jumu'ah.

[11] Although both Mateen and Shabazz were inmates at the time suit was filed and at the time this matter was initially heard by the court of appeals, Mateen was paroled on July 17, 1985 and Shabazz died of natural causes while incarcerated on January 15, 1986. Mateen and Shabazz sought declaratory, injunctive and monetary relief. The institution has continued its policy of denying lesser security Muslim inmates the right to attend the only weekly Sabbath congregational services of their faith.

(P.A. 53A), but the court opined that prison officials have no obligation to affirmatively demonstrate that a restriction on the free exercise rights of inmates "would in fact be detrimental to proper penological objectives. . . ." (P.A. 51A). According to the district court, a prison regulation abridging an inmate's First Amendment rights is still valid even if it is overbroad and "catch[es] within it some individuals for whom the same goals could be achieved with less trampling upon their rights" (P.A. 52A). Furthermore, the court held that the prison's rehabilitative goal of requiring inmates to work a full day without taking time off "to pursue personal matters," in order to prepare prisoners for careers in a free society (P.A. 46A), justified preventing minimum inmates on the Farm from attending Jumu'ah.

Respondents filed a timely appeal to the United States Court of Appeals for the Third Circuit. The case was argued before a panel of that court on June 21, 1985. Prior to issuance of a decision, the court *sua sponte* on August 29, 1985, set down the matter for rehearing en banc (P.A. 56A).

The Court of Appeals, in a nine-to-two ruling, vacated the decision of the trial court and remanded the matter for reconsideration. The majority stressed that the district court evaluated the inmates' claims under the standards articulated in *St. Claire* v. *Cuyler*, 634 F.2d 109 (3d Cir.), *rehearing denied*, 643 F.2d 103 (3d Cir. 1980) (P.A. 5A). Under the *St. Claire* test, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (citation omitted). Once the state has satisfied its burden under the *St. Claire* analysis, the court must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable."

Id. 115 (citations omitted) (P.A. 5A-6A). This substantial evidence requirement had been defined by the Third Circuit as establishing an extremely heavy burden, *see, e.g., Cole* v. *Flick*, 758 F.2d 124, 128 n.7 (3d Cir. 1985), heavier than the preponderance of the evidence standard typical in a civil suit.

The Third Circuit, in its opinion, recognized the expertise of prison administrators and the need for deference to the judgment of experienced prison officials (P.A. 6A-7A; 9A-10A; 11A) (citations omitted). The Court of Appeals also emphasized this Court's admonition that inmates retain "'those constitutional rights that are not inconsistent with their status as prisoners or with the legitimate penological goals of the corrections system '" (P.A. 7A) (citations omitted). The court stressed that there must be a "'mutual accommodation'" between the institution's objectives and the constitutionally protected rights of prisoners (P.A. 7A) (citations omitted).

In modifying the *St. Claire* test, the court below did not reach the ultimate question of whether the challenged regulations impermissibly impinged upon the inmates' religious rights (P.A. 9A). Rather, the court explained that the *St. Claire* standard which did not require any inquiry into the feasibility of accommodating prisoners' religious practices, provided inadequate protection for inmates' constitutional rights to freely exercise their religion (P.A. 9A). The court held that where "reasonable methods of accommodation can be *adopted without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (P.A. 10A) (footnote omitted) (emphasis added).

In so holding, the Court of Appeals reiterated that it "must afford deference to decisions by prison officials . . . but . . . such deference must be tempered by an effort to accommodate free exercise values." (*Id.*). The court recognized that the record in this case reveals particularly strong interests both on

the part of the prisoners as well as the prison administrators. The challenged regulation prohibits Muslim inmates from attending the only weekly Sabbath service of their faith and there is no indication that full participation in the service, which was allowed for five years previously, posed any security problems. The court also recognized that the security problems identified by the state cannot be disregarded and are worthy of serious consideration. Although the court emphasized the difficulties inherent in an effort to accommodate the sincere religious beliefs and practices of the inmates and the security problems of the institution, "federal courts are not free to abdicate their responsibility to see that a proper accommodation is achieved." (P.A. 11A-12A). The Court of Appeals for the Third Circuit remanded the case for reconsideraion in light of its opinion.

SUMMARY OF ARGUMENT

This Court has long recognized that "[t]he place of religion, in our society is an exalted one," *Abington School District* v. *Schempp*, 374 U.S. 203, 226 (1963), and freedom of religion is a fundamental right which possesses "a preferred position" in the pantheon of constitutional protections. *See, e.g., Murdock* v. *Commissioner of Pennsylvania*, 319 U.S. 105, 115 (1943). To protect fundamental constitutional rights, the Court has employed heightened scrutiny in reviewing regulations challenged on free exercise grounds. "[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. 205, 215 (1972). Moreover, the state generally may only justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 718 (1981).

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), "convicted prisoners do not forfeit all constitutional

protections by reason of their conviction and confinement in prison." *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979). Rather, this Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. 517, 523 (1984). While "a healthy sense of realism" requires courts to proceed with caution in scrutinizing prison practices, it is equally true that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Procunier* v. *Martinez*, 416 U.S. 396, 405-406 (1974). This Court has counseled lower federal courts to seek a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); *Wolff* v. *McDonnell*, 418 U.S. 539, 556 (1974).

This Court has repeatedly recognized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (*per curiam*). The Third Circuit's opinion in this case sought to balance both the institution's legitimate penological concerns and the inmates' commands of conscience. Petitioners' approach, which rejects the appellate court's standard of mutual accommodation, would eviscerate the principles underlying the Free Exercise Clause. Although imprisonment inevitably results in the curtailment of those rights inconsistent with legitimate penological objectives, there is nothing about the specific rights being asserted by respondents herein, or the values underlying the Free Exercise Clause, which compel their curtailment at the prison gate. Incarceration constitutes imprisonment of the body, not surrender of the spirit or forfeiture of the faith.

Contrary to petitioners' claim, the Third Circuit's standard of mutual accommodation is not based upon an assumption that the Free Exercise Clause is more important than other rights

in the Constitution. Rather, it represents the appropriate constitutional scrutiny for the nature of the fundamental right being infringed.

In seeking to abridge inmates' free exercise rights, petitioners cavalierly ignore the precise character of the right being asserted. The religious practice at issue, attendance at an obligatory Sabbath worship, is not inherently inconsistent with legitimate penological objectives and is not presumptively dangerous. The observance poses no threat to prison security or discipline. Petitioners' actions constitute an absolute prohibition of attendance at the only Muslim congregational Sabbath worship service, a service which must be observed during limited hours on Friday and cannot be made up.

Moreover, the unnecessary and irrational nature of the institution's policies is demonstrated by the inconsistent way in which prisoners of differing security risks are treated. Maximum security inmates are permitted to attend the holy Jumu'ah service, while gang minimum and full minimum security inmates are precluded from participation. In addition, the institution's policies deny Muslim inmates rights afforded adherents of other religions.

Petitioners' reliance upon the deferential standard applied to inmate claims in *Pell*, *Jones*, and *Bell* is misplaced. Each of these cases involved limitations of presumptively dangerous activities, and constituted traditional time, place and manner regulations, where the inmates possessed readily available alternatives. By contrast, in the case at bar, the prohibition on Jumu'ah attendance is an absolute prohibition on participation in obligatory Sabbath prayer, which is not presumptively dangerous, is a central tenet of the Muslim religion, and for which there are no readily available alternatives.

In holding that "[w]here . . . reasonable methods of accommodation can be adopted without sacrificing either the state's interest in security or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice . . . violates the prisoners'

First Amendment rights" (P.A. 10A), the appellate court essentially applied the proper standard, as set forth by this Court in *Procunier* v. *Martinez*, 416 U.S. at 413-414.

Petitioners would replace the balanced approach adopted by the Third Circuit with a standard of absolute deference to prison authorities. While the lower court recognized the need to give wide latitude to prison administrators, it was also mindful of the judicial obligation to scrupulously protect the fundamental constitutional rights of all, including the incarcerated.

"While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. at 414 n.14. In contrast to petitioners' policy, the Federal Bureau of Prisons, predicated upon the principles of equal opportunity and the preferred position of the First Amendment, allows all Muslim inmates, even those on outside work details, to attend the Jumu'ah service. Moreover, virtually every organization and commentator which has promulgated standards for correctional institutions has invariably required prison officials to make affirmative efforts to accommodate inmates' religious observance.

Although the lower court's standard balances institutional needs and the fundamental constitutional guarantees, it does not constitute a least restrictive alternative test. Rather, its mutual accommodation requirement seeks to ensure that where alternatives can be adopted which accommodate both legitimate penological concerns and religious observance, those alternatives be implemented. For in such cases, prison officials should have no interest in the unnecessary suppression of religious freedom.

The unduly deferential standard advocated by petitioners effectively eliminates meaningful protection for prisoners' religious freedom. The test proposed by petitioners fails to offer due consideration to the values underlying the Free Exercise Clause, the inmates' interest in congregational worship, or

the acknowledged security and rehabilitative benefits fostered by religious observance. It leaves the determination and protection of prisoners' constitutional rights in the hands of the very people accused of violating them.

Moreover, petitioners' test is inadequate in cases such as this, where the religious practice itself poses no security threat to the institution, but rather the infringement on religious freedom is a result of general prison policies. Since the petitioners' test does not require that security considerations be implicated by the prohibited activity, the general prison policies may be found rational, but that fails to consider whether the resulting deprivation of religious observance is justified. In addition, petitioners' proposed test offers no requirement that any effort be made to determine whether there are means by which the institution's security concerns and inmates' religious rights can be accommodated.

Not only does the lower court's test effectively protect the rights of inmates as well as the legitimate interest of the state, but petitioners' claim that this test's protection of prisoners' free exercise rights will adversely affect prisons or the courts is unjustified.

Finally, because work assignments at the institution are mandatory, and because successful completion of an outside work assignment in both gang minimum and full minimum is a prerequisite to release, petitioners are compelling Muslim inmates, by threat of sanction, to refrain from religiously motivated conduct. Petitioners are impermissibly conditioning a Muslim inmate's liberty on his willingness to forego a core observance of his faith. *Sherbert* v. *Verner*, 374 U.S. 398, 404 (1963); *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THERE MUST BE SOME MUTUAL ACCOMMODATION BETWEEN LEGITIMATE STATE INTERESTS AND THE CONSTITUTIONAL RIGHTS OF PRISONERS WHEN A PRISON RULE ABSOLUTELY PROHIBITS AN INMATE'S FREE EXERCISE OF A CENTRAL PRACTICE OF HIS RELIGIOUS FAITH AND THE PRACTICE POSES NO DIRECT THREAT TO PRISON SECURITY.

A. The Free Exercise of Religion Is A Fundamental Right.

This Court has long recognized that "[t]he place of religion, in our society is an exalted one, " *Abington School District* v. *Schempp*, 473 U.S. 203, 226 (1963), and freedom of religion is a fundamental right which possesses "a preferred position" in the pantheon of constitutional protections. *See, e.g, Murdock* v. *Commissioner of Pennsylvania*, 319 U.S. 105, 115 (1943).

The origins of the view that the right to free exercise of religion is a fundamental right of the highest order may be traced to the birth of this country itself, for many of those who settled this land came to America to escape religious persecution. *See, e.g., Everson* v. *Board of Education*, 330 U.S. 1, 8-9 (1947). The reoccurrence of similar forms of persecution in early American life "shocked the freedom-loving colonials into a feeling of abhorrence" and led to the "conviction that individual religious liberty could be achieved best under a government stripped of all power to interfere with the beliefs of a religious individual or group." *Id.* 11.

Guided by the historic legacy of the founding of this nation, the framers of the Constitution adopted the Free Exercise Clause to insulate religious practice from interference by the state. Throughout the years, this Court has recognized the fundamental importance of the Free Exercise Clause, "which, by its terms gives special protection to the exercise of religion."

Thomas v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 713 (1981) (and citations therein).

"Under the Religion Clauses, Government must guard against activity that infringed on religious freedom . . ." *Estate of Donald E. Thornton* v. *Caldor, Inc.*, ___ U.S. ___, 105 S.Ct. 2914, 2917 (1985). The Free Exercise Clause is premised on the need to ensure that minority religions enjoy the same opportunities for religious observance as those enjoyed by mainstream Christians. The Free Exercise Clause is designed "to secure religious liberty in the individual by prohibiting any invasion thereof by civil authority." *Abington School District* v. *Schempp*, 374 U.S. at 223. Moreover, the Constitution "affirmatively mandates accommodation, and not merely tolerance of all religions, and forbids hostility toward any." *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984).

As former Chief Justice Burger recognized, this Court has consistently emphasized "the central values underlying the Religion Clauses in our constitutional scheme of government." *Wisconsin* v. *Yoder*, 406 U.S. 205, 234 (1972). These values "have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* 214. To protect fundamental constitutional rights, the Court has employed heightened scrutiny in reviewing regulations challenged on free exercise grounds:

> It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation . . .' [*Sherbert* v. *Verner*, 374 U.S. 398, 406 (1963) (citation omitted.)].

"[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin* v. *Yoder*, 406 U.S. at 215.

Moreover, the state may only justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. *Thomas* v. *Review*

Board of the Indiana Employment Security Division, 450 U.S. at 718. "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-304 (1940).[12]

The free exercise cases convincingly testify to the weighty concerns implicated whenever government impinges on matters of religious conscience. While institutional interests must be fostered, fundamental free exercise rights should not be forgotten. Petitioners, in rejecting the appellate court's standard of mutual accommodation, demonstrate total disdain for the principles underlying the Free Exercise Clause. Although imprisonment inevitably results in the curtailment of those rights inconsistent with legitimate penological objectives, there is nothing about the specific rights being asserted by respondents herein, or the values underlying the Free Exercise Clause, which compel their curtailment at the prison gate. Incarceration constitutes imprisonment of the body, not surrender of the spirit or forfeiture of the faith.[13]

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[12] Although not all burdens on religion are unconstitutional, and religiously grounded conduct may be subject to regulation where conduct or actions have posed "some substantial threat to public safety, peace or order," *Sherbert* v. *Verner*, 374 U.S. at 403 (and cases cited therein), it is equally axiomatic that the state may only justify a limitation on religious liberty "by showing that it is essential to accomplish an overriding governmental interest." *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (and cases cited therein). Thus, this Court in a wide variety of cases has upheld challenges to purportedly neutral regulations which impose an impermissible burden on religious obligation. *See, e.g., Sherbert* v. *Verner*, 374 U.S. at 403 (state must modify its unemployment compensation requirement of willingness to work Monday through Saturday in order to accommodate the needs of those religiously opposed to working on Saturday); *Wisconsin* v. *Yoder*, 406 U.S. at 314 (Amish parents exempt from compulsory school attendance law, because it contradicts the Amish religious commitment to informal communal education and opposition to secular values); *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 718 (state unemployment law conditioning benefits on quitting one's prior job for "good cause" may not be applied to deny benefits to a Jehovah's Witness who quit rather than produce weapons in violation of his religious scruples).

[13] Certainly, the First Amendment must be applied "in light of the special characteristics of the . . . environment" in the particular case. *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 506 (1969), and the problems governing persons inside prisons are greater and different from those governing persons outside the walls. *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 1. But the fundamental importance of the values underlying the Free Exercise Clause of the First Amendment are not altered simply because the First Amendment claimants are incarcerated.

B. A Prisoner's Free Exercise Of Religion Is Not Fundamentally Inconsistent With Imprisonment Or Incompatible With The Objectives Of Incarceration.

Although imprisonment necessarily places limits upon many of the constitutional freedoms enjoyed by free citizens, *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 125 (1977), "convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell* v. *Wolfish*, 441 U.S. at 545. Rather, this Court has "insisted that prisoners be accorded those rights not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration." *Hudson* v. *Palmer*, 468 U.S. at 517, 523 (1984); *Coffin* v. *Reichard*, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied*, 325 U.S. 887 (1945) ("A prisoner retains all the rights of an ordinary citizen except those expressly, or by necessary implication, taken from him by law.").[14] While, "a healthy sense of realism," *Procunier* v. *Martinez*, 416 U.S. 396, 405 (1974) requires courts to proceed with caution in scrutinizing prison practices, it is equally true that "[w]hen a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights." *Id.* 405-406. This Court has counseled lower federal courts to seek a "mutual accommodation between institutional needs and objectives and the provi-

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[14] It should be stressed that this has not always been the case. Rather, in the not too distant past, a prison inmate was considered a "slave of the state" having "not only forfeited his liberty, but all his personal rights . . ." *Ruffin* v. *Commonwealth*, 62 Va. (21 Gratt.) 790, 796 (1871). *See also*, Note, *Beyond the Ken of the Court: A Critique of Judicial Refusal to Review the Complaints of Convicts*, 72 YALE L. J. 506 (1963); Haas, *Judicial Politics and Correctional Reform: An Analysis of the Decline of the "Hands-Off" Doctrine*, 1977 DET. C. L. REV. 795 (1977).

sions of the Constitution that are of general application." *Bell* v. *Wolfish*, 441 U.S. 520, 546 (1979); *Wolff* v. *McDonnell*, 418 U.S. at 539, 556 (1974).

For example, this Court has held that invidious racial discrimination is as intolerable within a prison as without. *Lee* v. *Washington*, 390 U.S. 333 (1968) (*per curiam*). Like others, prisoners retain the constitutional right to petition the Government for redress of their grievances, which include a reasonable right of access to the courts. *Johnson* v. *Avery*, 393 U.S. 483 (1969). Prisoners may not be deprived of life, liberty or property without due process of law, *see*, *e.g.*, *Wolff*, 418 U.S. at 539; and the Eighth Amendment ensures that they will not be subject to "cruel and unusual punishment." *Estelle* v. *Gamble*, 429 U.S. 97 (1976).[15]

Similarly, inmates retain First Amendment rights of speech "not inconsistent with [their] status as . . . prisoner[s] or with legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974).

This Court has repeatedly recognized that "reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (*per curiam*); *Cooper* v. *Pate*, 378 U.S. 546 (1964) (*per curiam*); *Wolff* v. *McDonnell*, 418 U.S. at 556 ("Prisoners have been held to enjoy substantial religious freedom . . ."). [16]

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[15] Indeed, there can be little doubt that courts of this country have a special obligation to protect the rights of prisoners. *See Rhodes* v. *Chapman*, 452 U.S. 337, 358-361 (1981) (Brennan J., concurring in judgment). "Disenfranchised, scorned and feared, often deservedly so, shut away from public view, prisoners are surely a 'discrete and insular minority.'" *Hudson* v. *Palmer*, 468 U.S. 517, 557 (1984) (Stevens J., concurring in part and dissenting in part).

[16] The right of prison inmates to the free exercise of their religion has been recognized by the federal courts in many different contexts. *See*, *e.g.*, *Burgin* v. *Henderson*, 536 F.2d 501 (2d Cir. 1976) (right to grow beard for religious purposes); *Kahane* v. *Carlson*, 527 F.2d 492 (2d Cir. 1975) (prison must make allowance for religiously-based dietary restrictions); *Walker* v. *Blackwell*, 411 F.2d 23 (5th Cir. 1969) (right of access to religious literature); *Barrett* v. *Commonwealth of Virginia*, 689 F.2d 498 (4th Cir. 1982) (legal recognition of religiously motivated name change); *Battle* v. *Anderson*, 376 F.Supp. 402, 427 (E.D. Okla. 1974) (right of Muslims to attend congregational worship).

The Solicitor in his brief concedes that "religious freedom is special in certain ways." Thus, unlike associational and speech rights, religion "can be a highly personal and private right." (S.Br. 17). Furthermore, infringement upon the free exercise of religion "may have more serious consequences to the claimant than the denial of other rights" and unlike other constitutional rights which "are typically exercised as a matter of volition and preference, religion is often viewed as a matter of personal duty." (*Id.* 17-18). Finally, the Solicitor conceded that "religion often furthers security and rehabilitative objectives." (*Id.* 27). Nonetheless, the Solicitor stresses that since no one constitutional right is more important than any other, the minimum rationality standard of review which this Court previously applied in *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, *Pell* v. *Procunier*, 417 U.S. 817, and *Bell* v. *Wolfish*, 441 U.S. 520, should automatically apply to the free exercise rights being asserted by respondents herein (S.Br. 17-19).

However, the Solicitor has missed the point. The issue is not whether the Free Exercise Clause is a more important right than Freedom of Association, Free Speech or the Due Process Clause. Rather, the focus is the appropriate test to be applied in adjudicating respondents' free exercise challenge.

The Free Exercise Clause is not merely the Free Speech Clause restated in the Constitution. And, "it is the character of the right, not of the limitation, which determines" the appropriate test to be applied. *Thomas* v. *Collins*, 323 U.S. 516, 530 (1945).[17]

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[17] This basic principle of adjudication of constitutional rights has been applied in cases outside the prison context. Thus, this Court has never applied the same level of scrutiny to time, place and manner regulations under the Free Speech Clause as it has to claims of infringement under the Free Exercise Clause. *Compare*, *Grayned* v. *City of Rockford*, 408 U.S. 104

Indeed, this Court has explicitly recognized this principle in adjudicating constitutional rights of inmates. This Court's prior prison cases suggest "a tripartite standard, drawn by reference to the nature of the right being asserted by prisoners, the type of activity in which they seek to engage, and whether the challenged restriction [in this case attendance at the only congregational Sabbath service of the faith] works a total deprivation (as opposed to a mere limitation) on the exercise of that right." *Abdul Wali* v. *Coughlin*, 754 F.2d 1015, 1033 (2d Cir. 1985) (and citations therein).

Thus, where the asserted right is inherently inconsistent with legitimate penological objectives or the activity sought to be engaged in is presumptively dangerous, far less judicial scrutiny is appropriate. *See, e.g., Hudson* v. *Palmer*, 486 U.S. at 523. ("prisoners have no legitimate expectation of privacy and * * * the Fourth Amendment's prohibition on unreasonable searches does not apply in prison cells"); *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. at 133 (an inmate labor union "would rank high on anyone's list of potential trouble spots" in prison).

In contrast, petitioners conveniently overlook the precise nature of the right being asserted by respondents in this case.

(1972) and *Wisconsin* v. *Yoder, supra*. Similarly, under the Equal Protection Clause, social and economic legislation receives far less scrutiny than legislation which infringes upon fundamental rights protected by the Constitution. *Compare, United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166 (1980) and *New Orleans* v. *Dukes*, 427 U.S. 297 (1976) with *Kramer* v. *Union Free School District No. 15*, 395 U.S. 621 (1969) and *Shapiro* v. *Thompson*, 394 U.S. 618 (1969). Indeed, the same issue may receive different treatment under different constitutional provisions. *See, e.g., United Building and Construction Trades Council* v. *Mayor and Council of the City of Camden*, 465 U.S. 208, 220-222 (1984) (hiring preference for city residents subject to privileges and immunities clause but not violative of the commerce clause).

Similarly, certain rights enjoyed by prisoners logically survive incarceration. *See, e.g., Bounds* v. *Smith*, 430 U.S. 817 (1977); *Estelle* v. *Gamble* (Eighth Amendment). Other rights are held to be *per se* inconsistent with a prisoner's status. *See, e.g., Hudson* v. *Palmer* (Fourth Amendment).

1. The religious practice at issue, attendance at an obligatory Sabbath worship service, is not inherently inconsistent with legitimate penological objectives and is not presumptively dangerous.

2. The congregational Sabbath worship service is not a peripheral right, but represents a core concern of the Free Exercise Clause.[18]

3. The institution's security concerns are unrelated to the prohibited activity, as the religious practice at issue poses no threat to prison security or discipline.

4. The institution's policy effectively creates a double standard under which Muslim prisoners are denied rights of attendance at a congressional religious worship service which are afforded adherents of religions with Saturday or Sunday services.

5. Petitioners' misplaced reliance on purported security concerns is underscored by the irrational effect of petitioners' policy changes, which result in maximum security inmates, those inmates who represent the greatest security risk and thus are confined to the institution, being permitted to continue to attend the Muslim Sabbath worship service, but gang minimum and full minimum inmates who are the lesser security risks, being precluded from continuing to participate in this service. Thus, petitioners' policies encourage retention of maximum security status in order for an inmate to preserve religious freedom.

[18] Although respondents' sincerity of belief is undisputed, centrality of the prohibited practice may at times warrant greater judicial scrutiny beyond that of other specially protected religious activity. This may be particularly important in weighing the countervailing individual interests affected by the state's prohibition. As one commentator stressed:

> Closely related to the question of sincerity is the element of how central or essential to the religion is the practice affected by the prohibition or requirement. Clearly, a conflict which threatens the very survival of the religion or the core values of a faith poses more serious free exercise problems than does a conflict which merely inconveniences the faithful.

L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 14-11 at 862 (1978). As the district court pointed out: "The Jumu'ah is . . . regarded as the central service of the Muslim religion, and the obligation to attend is commanded by the Qur'an, the central book of the Muslim Religion." (P.A. 43A).

6. The restriction being imposed is not a reasonable regulation of time, place or manner where there are readily available alternatives, but is an absolute prohibition on attendance at the only Muslim Sabbath worship service, the practice of which must be observed during certain limited hours, is obligatory, cannot be made up, and must be performed in congregation.

7. The inmates are not asking the state to enforce a novel program or enforce a previously unrecognized right, but to preserve a longstanding religious practice, which was never a threat to institutional security. *Cf.*, *Board of Education* v. *Pico*, 457 U.S. 853, 871-872 (1982) (distinction in First Amendment analysis between acquisition of and removal of books from school library).

Petitioners suggest that because Muslim inmates are permitted to engage in other religious practices "the no return policy did not, in effect, constitute a flat ban on the free exercise rights of these two Muslim inmates." (P.Br. 36). Petitioners apparently claim that because, for example, the state offers pork-free meals, petitioners' conduct is not a blanket prohibition on the free exercise of religion and compensates for the inability of Muslim inmates to attend the only Sabbath worship service of their faith. (P.Br. 36-39); (S.Br. 16 n.12).

Such a claim is disingenuous. First of all, the focus of the issue before this Court is not the free exercise policies of the prison in general, but the prohibition on attendance at Jumu'ah. Secondly, such a cavalier attitude demonstrates extreme insensitivity to the Jumu'ah service. As the district court found, and petitioners have never contested, this is "the central service of the Muslim religion." (P.A. 43A). There is unique spiritual content to the participation in such an observance which cannot be replicated by other religious practices. It is of little consolation to a Muslim inmate denied participation in the central service of his faith, that other less important religious rites are available.

Moreover, while courts may be capable of assessing alternate means of communication under the Free Speech Clause, it is neither appropriate for petitioners or this Court to determine whether one religious practice may be substituted or altered without infringing on religious beliefs. "It is not within 'the judicial function and judicial competence,' however, to determine whether [respondents] or the Government [have] the proper interpretation of the [Muslim] faith." *United States* v. *Lee*, 455 U.S. 252, 257 (1982) (citation omitted). "Courts are not arbiters of scriptural interpretation." *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 716.[19]

As Justice Jackson eloquently stated in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642 (1943):

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

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[19] *Cf.*, *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 709-710 (1976) (citations omitted):

> 'First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. . . . [T]he [First] Amendment therefore commands civil courts to decide church property disputes without resolving underlying controversies over religious doctrine.'

In stressing the inapplicability of time, place and manner regulations to free exercise claims, if such regulations constitute an integral part of the religious claim, one commentator observed:

> Just as the legislative or executive branches cannot, under the Constitution, impose their religious views on citizens by mandatory prayer in public schools, the judiciary must not be allowed to 'establish' a religion by making legal rights contingent upon a court's interpretation of religious doctrine. [Hutchinson, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish*, 11 N.Y.U. REV. OF L. AND. SOC. CH., 413, 433 (1982-1983) (footnote omitted)].

"The State of [New Jersey], no less than the Congress of the United States must respect that basic truth." *Wallace* v. *Jaffree*, ___ U.S. ___, 86 L.Ed.2d 29, 42 (1985).[20]

In their haste to deprive prisoners of basic religious freedom, petitioners ignore the character of the right being asserted by respondents which warrants that an effort be made to mutually accommodate the institution's legitimate penological concerns and the inmates' commands of conscience. To hold to the contrary, is to ignore the nature and values underlying the specific fundamental right which respondents are asserting.

C. The Decision Of The Court Of Appeals Comports With The Constitutional Jurisprudence Of This Court.

Although petitioners concede that the standard set forth by the court below "protects fundamental constitutional rights of inmates" (P.Br. 28), both the petitioners (P.Br. 23-30) as well as the Solicitor (S.Br. 15-17) contend that the Third Circuit's decision contradicts the approach taken by this Court in adjudicating constitutional claims asserted by prison inmates. Such an assertion is predicated upon two basic flaws: a misinterpretation of the decisions of this Court and a mischaracterization of the rationale of the lower court.

Petitioners contend that the deferential standard applied by this Court in *Pell* v. *Procunier*, *Jones* v. *North Carolina Prisoners' Union*, and *Bell* v. *Wolfish*, control the result in this case. Such reliance is misplaced. All of these cases arose in a context where the activity being engaged in was presumptively dangerous and where prison officials, to the extent consistent with substantial institutional interests, offered alternative means to accommodate inmates' First Amendment rights.

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[20] Nor is there any basis for petitioners' unsubstantiated claim that during the summer, because of the time span of the Jumu'ah prayer, worship could be held later, permitting inmates who return from work to attend the service (P. Br. 36). The testimony of record (Tr. 35-36, 38) and the unequivocal findings of the district court hold to the contrary (P.A. 43A-44A).

In *Pell* v. *Procunier*, this Court upheld a prohibition against face-to-face visits between prisoners and news reporters. In upholding the limitation on inmates' unfettered rights to communication, this Court stressed that other available avenues of communication remained open to the prisoners. 417 U.S. at 824-25. Accordingly, the regulation was characterized as a reasonable "time, place or manner" restriction, *id.* 826 (and cases cited therein); *see Grayned* v. *City of Rockford*, 408 U.S. 104 (1972). Under such circumstances, *Pell* set forth the minimum rationality test which petitioners contend should control the prohibition placed on Muslim inmates from attending the only Sabbath worship service of their faith:

> Considerations [of security] are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to show that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their judgment in such matters. [*Id.* 827].

But *Pell* itself explicitly recognized that judicial deference was proper because the officials had already accommodated First Amendment rights by offering inmates readily available alternatives to face-to-face interviews. The regulation was upheld because it met the traditional "time, place or manner" test. It was content neutral in that it applied equally to all prisoners and all reporters and, most significantly, several alternative means of communicating with the public, including with reporters, were available to the inmates.[21] *See* 417 U.S. at 824-825, 827. Finally, the obvious magnitude of the security

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[21] That alternate means of communication were of great importance to the Court's decision in *Pell* is evidenced by the Court's repeated reference to that factor. *See id.* 823 ("we think that the regulation cannot be considered in isolation but must be viewed in light of alternative means of communication permitted under the regulations"); *id.* 824 ("we regard the available 'alternative means of [communication as] a relevant factor' . . ."); *id.* 827-828 ("in light of the alternative channels of communication that are open to prison inmates, we cannot say on the record in this case that this restriction on one manner in which prisoners can communicate with persons outside of prison is unconstitutional.").

concerns triggered by the entry of outsiders into the prison for face-to-face communication with the inmates compelled this Court to uphold the ban on prison interviews by the news media. *Id.* 826.

In *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, this Court upheld a ban against solicitation and meetings by a prisoners' labor union. The Court explicitly stated "First Amendment speech rights are barely implicated." 433 U.S. at 130 (footnote omitted). Although that statement alone suffices to distinguish *Jones* from this case, numerous other grounds exist. The Court stressed that prohibitions on bulk mailings are reasonable as other avenues of communication are available. *Id.* 131.[22] Furthermore, this Court reasoned that First Amendment associational rights which are most directly implicated by the regulatory prohibitions in *Jones*, are rights which are "necessarily curtailed by the realities of confinement." *Id.* 132. Finally, a prisoners' union was viewed as presumptively dangerous. "The case of a prisoner's union, where the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials surely would rank high on anyone's list of potential trouble spots." *Id.* 133.

In *Bell* v. *Wolfish*, a group of pretrial detainees contended *inter alia*, that a regulation prohibiting the receipt of hardback books not mailed directly from publishers, bookclubs or book-

[22] As for solicitation of membership, it "involves a good deal more than the simple expression of individual views as to the advantages or disadvantages of a union or its views; it is an invitation to collectively engage in a legitimately prohibited activity." *id.* 131-132. The legitimately prohibited activity, although not specifically identified by the Court, appears to be a particular method of communication with prison officials—"concerted group activity" *id.* 129, in which "the focus is on the presentation of grievances to, and encouragement of adversary relations with, institution officials . . ." *Id.* 133. This method of communication may be prohibited, as "the State has not hampered the ability of prison inmates to communicate their grievances to correctional officials. . . . [They] have merely affected one of several ways in which inmates may voice their complaints to, and seek relief from, prison officials." *Id.* 130 n.6. Thus, the minimum rationality test set forth in *Pell* and its progeny is controlling.

stores violated the First Amendment. The receipt of paperback books, magazines, and other soft-covered materials from any source was permitted. This Court upheld the prohibition, concluding that it was a rational response to an "obvious security problem." 441 U.S. at 550. "It hardly needs to be emphasized that hardbook books are especially serviceable for smuggling contraband into an institution; money, drugs and weapons may be secreted in the bindings." *Id.* 550-551 (citation omitted). Furthermore, the regulation was characterized merely as a "time, place or manner restriction." *Id.* 551-552. The Court stressed that "[t]he rules operate in a neutral fashion, without regard to the content of the expression . . . [a]nd there are alternative means of obtaining reading material that have not been shown to be burdensome or insufficient." *Id.* 551 (citation omitted). Finally, the Court held that the double bunking of detainees and detainees' desire to be free from discomfort "does not rise to the level of those fundamental liberty interests delineated in such cases as *Roe* v. *Wade*, 410 U.S. 113 (1973)" and its progeny. *Id.* 534-535.

In contrast to the issues involved in *Pell*, *Jones*, and *Bell*, the prohibition herein on Jumu'ah attendance is not a time, place or manner regulation, but an absolute proscription on participation in obligatory congregational Sabbath prayer, which is a central tenet of the Muslim religion. Nor is the regulation content neutral, as the elimination of the Friday alternate work detail results in the denial of rights of worship to Muslim inmates which are afforded adherents of religions with Saturday or Sunday services. Unlike face-to-face interviews in *Pell*, a prisoner's union in *Jones*, or hardback books in *Bell*, Jumu'ah worship is not a presumptively dangerous activity inconsistent with penological objectives. Attendance at Jumu'ah has posed no security problems in the past and is continuing in the present for maximum security inmates. Finally, the right of free association at issue in *Jones*, is not as firmly anchored in the text of the First Amendment as is the Free Exercise Clause, and is one of the constitutional rights most severely curtailed by confinement. In contrast, it is clearly acknowledged that

religious observance is a core First Amendment right, which often fosters the institution's goals of rehabilitation and security.

Nor can petitioners convincingly argue that in allowing Muslim inmates to engage in religious practices other than Jumu'ah, they have fulfilled their constitutional duty. (P.Br. 36-37). As previously stressed (*supra* 28-30), it is of little consolation to a Muslim inmate to engage in other free exercise activities, when he is denied the right to participate in what the district court concluded was "the central service of the Muslim religion." (P.A. 43A). It is undisputed that the Jumu'ah service is not a peripheral concern, but a central tenet of the Muslim faith.

Furthermore, unlike *Pell*, *Jones*, or *Wolfish*, herein there is no connection between the prohibited activity and the institution's security concerns. Rather, Jumu'ah participation was precluded only when the state changed other practices wholly unrelated to Jumu'ah attendance, and acted in response to problems unconnected with the Jumu'ah service. Thus, simply focusing on whether the institution's security concerns are reasonable is irrelevant, where those concerns are connected with policies unrelated to Jumu'ah worship. "It is critically important then that the record reveal the manner in which security considerations are implicated by the *prohibited activity.*" *Caldwell* v. *Miller*, 790 F.2d 589, 597 (7th Cir. 1986) (emphasis added).[23]

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[23] Thus, since the prohibition on gang minimum inmates attending Jumu'ah occurred as a result of the unilateral elimination of the alternate work detail, focusing on the justification for either the New Jersey Classification Standard (Standard 853) or the March 1984 "no-return" policy is irrelevant. Similarly, since the district court found, and petitioners have never contested, that the security concerns underlying the March 1984 "no-return" policy did not apply to the prohibition on full-minimum inmates attending Jumu'ah (P.A. 46A), the relevant question regarding the restriction on minimum inmates is whether the institution's purported rehabilitation goal of teaching inmates "to work a full, productive day without taking time off from their jobs to pursue personal matters" (*id.*), justifies abridgement of core First Amendment rights.

In contrast to the inapplicability of the test established in *Pell* and its progeny, is this Court's decision in *Procunier* v. *Martinez*, 416 U.S. 397 (1974), which establishes the proper scope for reviewing the deprivation of core First Amendment rights. In *Martinez*, the Court established a heightened scrutiny standard of review for prison regulations censoring the content of letters sent by inmates and non-prisoners alike. *Id.* 413. As a threshold matter, the Court stressed that the activity in question was not incompatible with penological goals or an individual's status as a prisoner. *Id.* 412. In its decision, the Court recognized that the case arises in prison, where the identifiable government interests include "preservation of internal order and discipline, the maintenance of institutional security against escape or unauthorized entry, and the rehabilitation of the prisoners." *Id.* 412 (footnote omitted).

Moreover, the Court recognized (as did the Third Circuit in the instant case (P.A. 6A-7A; 10A-11A)) the need for judicial restraint, based on an appreciation of the difficulties of prison administration and that courts are often "ill-equipped" to deal generally with prison reform. *Id.* 404-405.

> But a policy of judicial restraint cannot encompass any failure to take cognizance of valid constitutional claims whether arising in a federal or state institution. When a prison regulation or practice offends a fundamental constitutional guarantee, federal courts will discharge their duty to protect constitutional rights. [*Id.* 405-406 (citation omitted)].

Accordingly, the Court established a standard of review for incidental deprivations on retained fundamental rights neither inconsistent with a person's status as a prisoner or incompatible with penological goals. In striking this balance, *Martinez* held that to justify a regulation encroaching on First Amendment rights, prison officials bear the burden of showing that the regulation actually "furthers one or more of [these] substantial governmental interests." *Id.* 413. The Court further held that even where the regulation is shown to further such an interest, "the limitation of First Amendment freedoms must be

no greater than is necessary or essential to the protection of the particular governmental interest involved" and that an otherwise appropriate regulation "will nevertheless be invalid if its sweep is unnecessarily broad." *Id.* 413-414.[24]

Under the *Martinez* test in the free exercise context, prison officials bear the burden of justifying regulations prohibiting religious practices. They must simply demonstrate that any regulation resulting in the prohibition or restriction of a religious activity actually furthers the governmental interest of security, order, and rehabilitation and is no greater than "necessary or essential to the protection of the particular governmental interest involved." *Id.* 413. The Court below, in essentially applying the *Martinez* test, held that "[w]here it is found that reasonable methods of *accommodation can be adopted without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' First Amendment rights." (P.A. 10A) (emphasis added) (footnote omitted). The Third Circuit test simply reflects the requirement of "mutual accommodation between institutional needs and objectives and the provisions of the Constitution,"

[24] Nothing herein indicates that this standard was meant to apply solely to non-prisoners. Rather, the *Martinz* standard applied to claims raised by both the inmates and their correspondents. Moreover, in *Jones* v. *North Carolina Prisoners' Labor Union, Inc., supra*, even though the Court recognized the inherent danger of a union in a prison context, where the prison made no accommodation of the inmates' associational rights, the Court upheld the prohibition stating that "the regulations are drafted no more broadly than they need to be to meet the perceived threat which stems directly from group meetings and group organizational activities of the Union." 433 U.S. at 133, *citing Procunier* v. *Martinez*, 416 U.S. at 412-416. Thus, to the extent that a particular activity has been foreclosed and no accommodation made, this Court has applied the *Martinez* test to the rights of prisoners. *Martinez* has also been applied by several other appellate courts in contexts other than prisoner correspondence. *See, e.g., Abdul Wali* v. *Coughlin, supra*, 754 F.2d at 1030 n.7 (and cases cited therein); *Barrett* v. *Virginia*, 689 F.2d 498, 502 (4th Cir. 1982) (name change); *Bradbury* v. *Wainwright*, 718 F.2d 1538, 1543 (11th Cir. 1983) (marriage).

Wolff v. *McDonnell*, 418 U.S. at 556, which is particularly essential in a case like this, where the prohibition on religious practice is a result of broad prison rules, unrelated to the practice of religion.[25] Because petitioners never had the burden of demonstrating that security interests actually necessitated restrictions on religious practice, the Third Circuit properly vacated the judgment and remanded this matter for further proceedings (P.A. 12A).

D. Petitioners Misconstrue The Decision Of The Court Of Appeals.

Not only have petitioners misconstrued the decisions of this Court, but they have mischaracterized the rationale of the Court of Appeals. As a threshold matter, petitioners' fundamental misunderstanding of the appellate court's holding may be due to and is evidenced by petitioners' statement that "[t]he lower court has erroneously articulated a standard of review heretofore reserved for analyzing infringements of fundamental rights of free citizens." (P.Br. 22). On the contrary, the lower court's standard of mutual accommodation does not approach the type of heightened scrutiny applied by this Court in cases involving abridgment of fundamental First Amendment rights outside the prison context. *See, e.g., Sherbert* v. *Verner*, 374 U.S. at 405-406; *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 718.

Petitioners further contend that any constitutional challenge to a prison policy "which has the effect of restricting a

[25] The Third Circuit's opinion comports with the approach taken by other federal courts in adjudicating restrictions upon fundamental rights in the prison context. *See, e.g., Barrett* v. *Virgina*, 689 F.2d at 502; *Bradbury* v. *Wainwright*, 718 F.2d at 1543; *Patterson* v. *Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983) ("the limitation [on First Amendment rights] must be no greater than is necessary to protect the particular governmental interest involved") (citation omitted); *Teterud* v. *Burns*, 522 F.2d 357, 359 (8th Cir. 1975): ("While deference is accorded the expertise and discretionary authority of the corrections officials, a regulation which is more restrictive than necessary to meet the institutional objectives or which does not serve the objectives advanced will be struck down.") (citations omitted).

First Amendment interest 'must be analyzed in terms of the legitimate policies and goals of the corrections system'" (P.Br. 23) (citation omitted), and federal courts must grant considerable deference to the judgment of prison officials (P.Br. 24-27). However, simply to state these propositions (neither of which either the lower court or the respondents disagree with), does little in assisting this Court in developing the proper standard for reconciling the institution's legitimate penological interests and the inmates' commands of conscience. *Cf.*, *Pell* v. *Procunier*, 417 U.S. at 823 ("But this is merely to state the problem, not to resolve it.").

Furthermore, contrary to petitioners' claim, the Third Circuit's opinion repeatedly recognizes and subscribes to the importance of judicial deference to the expert opinions of prison administrators (P.A. 7A; 9A-10A; 11A). *Cf.*, *Bounds* v. *Smith*, 430 U.S. 817, 832 (1977) ("Petitioners' hyperbolic claim is particularly inappropriate in this case, for the court[ ] below scrupulously respected the limits on [its] role.").

However, contrary to petitioners' claim, judicial deference to the professional judgment of prison administrators should not be converted into judicial abdication of the constitutionally mandated role of the federal courts. "The deference owed to an expert tribunal cannot be allowed to slip into judicial inertia . . ." *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). While the Third Circuit recognized the expertise of prison administrators, the Circuit also recognized that courts may not forego their constitutional mandate simply because a case arises in a prison setting. As Justice Jackson stated:

> [W]e act in these matters not by authority of our competence, but by force of our commissions. We cannot, because of modest estimates of our competence in . . . specialities . . . withhold the judgment that history authenticates as the function of this Court when liberty is infringed [*West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 640].

Like the Third Circuit, this Court has been ever mindful of both the need to give wide latitude to prison administrators

and the obligation to vigorously protect the fundamental constitutional rights of the imprisoned:

> While we have recognized that judicial restraint is often appropriate in prisoners' rights cases, we have also repeatedly held that this policy 'cannot encompass any failure to take cognizance of valid constitutional claims . . .' [*Bounds* v. *Smith*, 430 U.S. at 832 (citation omitted)].

The fact that responsibility for our nation's prisons is vested in prison administrators, "does not mean that constitutional rights are not to be scrupulously observed." *Bell* v. *Wolfish*, 441 U.S. at 562.[26] "Courts cannot, of course, abdicate their constitutional responsibility to delineate and protect fundamental liberties." *Pell* v. *Procunier, supra*, 417 U.S. at 817.[27]

"Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners." *Cruz* v. *Beto*, 405 U.S. at 321. "[J]udicial intervention is *indispensable* if constitutional dictates . . . are to be observed in the

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[26] Prison officials are not judges and should not be the arbiters of constitutional rights:

> While the judgments of prison officials are entitled to considerable weight because they are based upon first-hand observance of the events of prison life and upon a certain expertise in the functioning of a penal institution, prison officials are not judges. They are not charged by law and constitutional mandate with the responsibility for interpreting and applying constitutional provisions, and they are not always disinterested persons in the resolution of prison problems. We do not denigrate their views but we cannot be absolutely bound by them. [*Brown* v. *Peyton*, 437 F.2d 1228, 1232 (4th Cir. 1971)].

[27] Petitioners also contend that the lower court's standard although "protect[ing] fundamental constitutional rights of inmates" (P. Br. 28), "threatens the values of federalism, which to date, this Court has recognized are served by allowing the states to control state prisons." (P. Br. 36). Moreover, the issue here is not control of state prisons, but the level of protection for fundamental constitutional rights. In response to virtually the same argument, this Court stressed in *Johnson* v. *Avery*, 393 U.S. at 486:

> It is clear, however, that in instances where state regulations applicable to inmates of prison facilities conflict with such [paramount federal constitutional or statutory] rights, the regulation may be invalidated.

prisons." *Rhodes* v. *Chapman*, 452 U.S. 337, 354 (Brennan J., concurring in the judgment).[28]

Petitioners' approach substitutes judicial abdication for judicial restraint, resulting in inmates' free exercise rights being left to the discretion of prison administrators. Neither logic, the facts of this case, nor the decisions of this Court warrant such an unprecedented result.

Because unquestioned deference to prison officials' assessment of the justification for abridgement of the right of inmates in the general prison population to attend Jumu'ah is so critical to petitioners' argument, it is worth examining the views of other prison administrators regarding religious observance. For example, the Federal Bureau of Prisons allows all inmates to participate in Jumu'ah (S.Pr. Appendix 1a). Federal regulations also prohibit work assignments which violate an inmate's faith, 28 C.F.R. § 548.14, affirmatively mandate prison officials "to facilitate the observance of important religious holidays and celebrations" and "to allow an inmate to take non-consecutive vacation days, or to make-up for missed work, or to change work assignments in order to facilitate the inmate's observance

[28] The Solicitor contends that "because religion often furthers security and rehabilitative objectives" prison officials are likely to be sympathetic to inmates' religious needs and unlikely to provoke needless confrontations over religious observance. (S. Br. 27). If that is correct, it is all the more important in cases where religious rights are denied, for the courts to carefully scrutinize such infringements. There are also strong institutional reasons why courts must ensure that the fundamental constitutional guarantees of inmates are observed. "As courts are accountable for the presence of the inmate in institutions, they arguably have a special interest in ensuring that all infringements of his rights are indeed justified." Note, *Prisoners' Rights and Prison Interests: Accommodation of Religious Dietary Practices in Prisons*, 27 SY. L. REV. 1231, 1236 (1976). Moreover, commentators have uniformly recognized that the political system has failed to protect even minimal constitutional standards on behalf of the incarcerated. *See, e.g.*, Note, *Prisoners' Rights, Institutional Needs and the Burger Court, 72 VA. L. REV.* 161, 190 (1986); Swygert, *In Defense of Judicial Activism*, 16 VAL. U. L. REV. 439, 454-455 (1982). Finally, prison administrators, as a result of the nature of their position and public pressure, inevitably err on the side of too little freedom. *Jones* v. *North Carolina Prisoners' Union, Inc.*, 433 U.S. at 141-142 (Marshall, J., dissenting) (citation omitted).

of a religious holiday or celebration." 28 C.F.R. § 548.15. Indeed, Charles R. Riggs, Chaplain Director for the Federal Bureau of Prisons stated:

> Provision is made, by policy, in all Bureau facilities for the observance of Jumu'ah by all inmates in general population who wish to keep this faith practice. The service is held each Friday afternoon in the general time frame that corresponds to the requirements of the Islamic jurisprudence. This time is seasonaly (*sic*) adjusted to compensate for day-light savings regulations where applicable.
>
> Subject only to restraints of security and good order in the institution all routine and normal work assignments are suspended for the Islamic inmates to ensure freedom to attend such services . . .
>
> In those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu'ah.
>
> While there is an aspect of disruption to the work routines on occasion, the Bureau of Prisons feels that the necessity for equal opportunity to practice one's religious faith takes priority on this one day of the week. This is, of course, in the absence of any threat to the security of the institution.
>
> This pro-active stance toward freedom to practice the religious faith of choice is based on the equal treatment concept of the first (and preferred) amendment. [*See*, 1a-2a, Appendix to respondents' brief].

Moreover, virtually every organization and commentator which has promulgated standards for correctional institutions has invariably required prison officials to make affirmative efforts to accommodate inmates' religious observance.[29] "While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determina-

[29] *See, e.g.*, ABA, *Standards for Criminal Justice: Legal Status of Prisoners*, § 23-6.5 (1983); American Corrections Association, *Standards for Adult Correctional Institutions*, § 2-4468 (1984) (and ACA sample policy and procedures regarding religious programming); National Advisory Commission on Criminal Standards and Goals, *Corrections*, § 2.16 (1973).

tion of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. at 414, n. 14.

Not only is the abridgement of respondents' fundamental free exercise rights inconsistent with the writings of the recognized penological authorities in the field, but petitioners' policies are arbitrary and irrational. Thus, Muslim inmates are denied rights of religious observance which are afforded adherents of religions with Saturday or Sunday Sabbath services. Moreover, petitioners' policies result in maximum security inmates, those inmates who represent the greatest security risk to the institution, being permitted to continue to attend Jumu'ah worship, but gang minimum and full minimum inmates who are the lesser security risks, being precluded from participating in this service. Petitioners' policies effectively encourage retention of maximum security status in order for an inmate to preserve opportunities for religious worship. We know of no justification, and petitioners' brief does not offer one, for such an absurd result.[30]

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[30] Petitioners' reliance on *Goldman* v. *Weinberger*, ____ U.S. ____, 89 L.Ed.2d 478 (1986) (P. Br. 40) is misplaced. In *Goldman*, this Court upheld an Air Force regulation mandating uniform dress which resulted in denying the right of a Jewish serviceman to wear a yarmulke while in uniform. The Court's decision was predicated on the military requirement of absolute uniformity, and the yarmulke was presumptively violative of that regulation. Here by contrast, it is undisputed that observance of Jumu'ah is neither contrary to legitimate penological objectives nor presumptively dangerous. Moreover, rather than promoting uniformity, petitioners' conduct in the case *sub judice* evidences discrimination, by denying Muslim inmates rights afforded adherents of other faiths. Furthermore, unlike the practice in *Goldman* which was felt to detract from military requirements, it is generally agreed that religious services foster goals of rehabilitation and security. Finally, because of the unique nature of the military, this Court has upheld far greater restrictions on the constitutional rights of servicemen than have ever been sanctioned regarding inmates. *See, e.g., Chappell* v. *Wallace*, 462 U.S. 296 (1983) (enlisted military personnel unable to maintain damage action against superior officer for violation of constitutional rights in course of military service); *Middendorf* v. *Henry*, 425 U.S. 25 (1976) (no right to counsel in summary court martial proceedings); *Brown* v. *Glines*, 446 U.S. 348 (1980) (upheld regulation which required approval of commander for circulation of petitions on base, even petitions addressed to members of Congress and Secretary of Defense); *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975) (military courts have exclusive jurisdiction over military personnel, evenfor matters that may not be service related, such as marijuana possession).

Although the Solicitor concedes that religious exercise inside a prison is special (S.Br. 17-19), and that "religious exercise often does not raise security concerns" (S.Br. 19), he nonetheless argues that a minimum rationality test is appropriate, because free exercise claims may raise security concerns like any other constitutional right exercised in the prison context (S.Br. 18-19). But "institutional security concerns" is not a talismanic phrase which automatically compels deprivation of an inmate's fundamental constitutional guarantees.

> It is the business of prison officials, of course, to maintain order within their institutions. But this fact does not support a claim that every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security. Routine and automatic arguments to this effect have been made before and have been rejected by this Court. [*Cleavinger* v. *Saxner*, ____ U.S. ____, 106 S.Ct. 496, 504 (1985) (and cases cited therein)].

Because everything that occurs in a prison touches in some way on security, virtually any restriction on inmates' rights could be justified on grounds of institutional security.

> The Court must be especially alert when the alleged justification for an administration decision is institutional security, because literally any restraint could be justified on the ground of increased security. A naked man in chains in a bare cell poses no risk. From that point on, every increase in freedom brings at least some decrease in security. Every decision in a prison environment involves the weighing of lesser or greater restraint against the increased or diminished chances of contraband or escape . . . The Court is not to usurp the role of the jailer. But it cannot abandon its role as a proper forum for adjudication of the rights of prisoners. [*Valentine* v. *Englehardt*, 474 F.Supp. 294, 300-301 (D. N.J. 1979)].

This is particularly the case where there is no direct connection between the prohibition of religious observance and the institution's security concerns.

Finally, petitioners accuse the appellate court of having established a requirement that the prison impose the least

restrictive alternative (P.Br. 33-34). On the contrary, the lower court's decision simply seeks to ensure that "the challenged regulations were intended to serve, and do serve, the important penological goal of security, and that no reasonable method exists by which appellants' religious rights can be accommodated without creating *bona fide* security problems." (P.A. 9A). The lower court's decision does not require the least restrictive alternative; rather it prescribes adoption of the most restrictive alternative.

At no time does the lower court's decision require the prison to choose between religious freedom and legitimate institutional concerns. Rather, it simply mandates that where "reasonable methods of accommodation can be adopted *without sacrificing either the state's interest in security* or the prisoners' interest in freely exercising their religious rights, the state's refusal to allow the observance of a central religious practice cannot be justified and violates the prisoners' first amendment rights." (P.A. 10A) (emphasis added) For in such cases, prison officials should have no interest in the unnecessary suppression of religious exercise. The lower court's decision is not an effort "to supervise prisons but to enforce the constitutional rights of all 'persons'", *Cruz* v. *Beto*, 405 U.S. at 321, by determining whether security needs and religious exercise can be accommodated without harm to either.

Although an inmate's rights may be diminished by the exigencies of incarceration, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff* v. *McDonnell*, 418 U.S. at 555-556. The lower court's requirement of mutual accommodation simply seeks to ensure that where alternatives can be adopted that accommodate both the inmates' commands of conscience and the prison's concerns, those alternatives be implemented. Petitioners explicitly reject that they are required to consider such alternatives, reasoning that "[j]ust because a judge may devise one reasonable way to meet security problems, does not mean that any other choice is unconstitutional." (P.Br. 32). However, if the constitutional guarantees of the First Amendment mean anything, they must mean that if there is "one reasonable way" *to meet the institution's legitimate security needs and to allow the free exercise of religion*, that means must be adopted. The lower court's opinion requires no more, and the constitutional jurisprudence of this Court requires no less.

E. Petitioners Ignore The Important Values And Rehabilitative Benefits Which Religion Offers The Incarcerated Inmate.

Although stressing the importance of the prison's legitimate penological interests, petitioners completely ignore the benefits which religion offers incarcerated inmates. The values that underly the Free Exercise Clause and make it one of the "preferred freedoms," *see, e.g., West Virginia State Board of Education* v. *Barnette*, *supra*, 319 U.S. at 639; *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940), are as vital to those inside the prison walls as they are to those outside. *See, e.g.*, Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. 812, 852-854 (April 1977).[31] Nonetheless, petitioners virtually ignore the individual constitutional interests of the inmates and the values underlying First Amendment guarantees.

Furthermore, both courts and commentators have recognized that religious involvement serves important

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[31] Professor Giannella identified the fundamental free exercise value as "respect for the inviolability of conscience." Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, (part 1), 80 HARV. L. REV. 1381, 1386 (1967). "Personal alienation from one's Maker, frustration of one's ultimate mission in life, and violation of the religious person's integrity are all at stake when the right to worship is threatened." *Id.* 1427. "An inmate's conscience is no less inviolable than that of an unconfined citizen, and a violation could well work an even greater harm upon the inmate, whose means of spiritual recovery are limited by the prison environment." Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV., *supra*, at 853-854.

rehabilitative functions. Thus, religious participation can significantly assist an inmate in reevaluating himself and preparing for a return to society. *See, e.g.*, Barnes and Teeters, NEW HORIZONS IN CRIMINOLOGY 492-495 (3d ed. 1959). "In the lonely stifling prison environment, an inmate can sometimes find great strength and self-respect in religious practice." Comment, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. *supra* at 854 (and citations therein). "Prison is a demeaning and dehumanizing environment, which tends to strip away the inmate's personal identity and sense of worth. Religion in prison is thought to help the inmate 'reclaim his dignity and reassert his individuality.'" Note, *The Exercise of Religion in Prisons: The Right to Observe Dietary Laws*, 45 FORD.L.REV. 92, 98 (1976) (footnotes omitted) (and citations therein). Furthermore, the psychological literature indicates that religion plays a substantial role in promoting prosocial behavior, *see, e.g.*, C. Daniel Batson, "Sociobiology and the Role of Religion in Promoting Prosocial Behavior: An Alternative View," 45 J. OF PERSONALITY AND SOCIAL PSYCHOLOGY 1380 (1983), and that an individual who has accepted religious doctrine is less likely to exhibit hostility than a person not governed by the same religious mores. *See, e.g.*, Heintzelman and Fehr, *Relationship Between Religious Orthodoxy and Three Personality Variables*, 38 PSYCH. REPORTS 756 (1976).

Indeed, the courts have recognized the important rehabilitative role played by religion. Thus the Court of Appeals for the District of Columbia stressed:

> Treatment that degrades the inmate, invades his privacy, and frustrates the ability to choose pursuits through which he can manifest himself and gain self-respect erodes the very foundations upon which he can prepare for a socially useful life. Religion in prison subserves the rehabilitative function by providing an area within which the inmate may reclaim his dignity and reassert his individuality. [*Barnett* v. *Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969) (footnotes omitted)].

Walker v. *Mintzes*, 771 F.2d 920, 930 (6th Cir. 1985); *Brown* v. *Peyton*, 437 F.2d at 1230.

In seeking reversal of the Third Circuit's decision, petitioners disregard these values. In so doing, petitioners fail to properly evaluate the important constitutional interests at stake as well as the benefits which would inure to the institution by permitting respondents to continue to practice their religion without interference.[32] Ironically, although the Solicitor concedes that "religion often furthers security and rehabilitative objectives" (S.Br. 27), the Solicitor proposes a test which provides no consideration for the individual's vital constitutional rights. We know of no decision of this Court which warrants such wholesale abandonment of the underlying values and transcendent imperatives of the Free Exercise Clause.[33]

[32] Indeed, one of the earliest services held in an American prison was delivered by a guard on a speakers platform standing next to a loaded cannon pointing toward the captive audience. Barnes and Teeters, NEW HORIZONS IN CRIMINOLOGY, *supra*, at 491. Ironically, although petitioners are seeking to impede religious practice, American prisons originally were isolated asylums in which offenders were to render unto God the reverance and obedience that they had wrongfully denied him by committing crimes. Rothman, THE DISCOVERY OF THE ASYLUM, 85-86 (1971). Pioneered by William Penn and the Quakers and implemented in 1789 at the Walnut Street Gaol in Philadelphia, this approach sought to provide the prisoner with a place

> in which he could cogitate about his salvation, become reacquainted with his God, and do penance. Hence, the name of the institution—'penitentiary.' When such a reassessment of self had occurred, the offender could, theoretically, return to the community, literally a 'new man.'

Singer and Statsky, RIGHTS OF THE IMPRISONED: CASES, MATERIALS AND DIRECTIONS 4 (1974). The emphasis on religion which permeated the Pennsylvania system of imprisonment became the guiding influence in the European corrections community. *Id.* 4-5. *See also*, Comment *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV. *supra*, at 819-820.

[33] Although not reached by the Third Circuit, respondents also contend that petitioners violated the Fourteenth Amendment by denying Muslim inmates rights afforded adherents of religions with Saturday or Sunday Sabbaths. The Fourteenth amendment commands that a prisoner be afforded "reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts . . ." *Cruz* v. *Beto*, 405 U.S. at 322. *Accord*, *Cooper* v. *Pate*, (petitioner stated cause of action where he alleges that he was denied permission to purchase certain religious publications and denied privileges enjoyed by other

F. The Unduly Deferential Standard Advocated By Petitioners Effectively Eliminates Meaningful Protection For Prisoners' Religious Freedom.

Although petitioners concede that the standard adopted by the lower court "protects fundamental constitutional rights of inmates" (P.Br. 28), both petitioners and the Solicitor General advocate a standard of review which would effectively eviscerate any meaningful protection for prisoners' religious freedom.

Rather than the mutual accommodation standard adopted by the appellate court, petitioners advance the standard applied in the district court and first set forth in *St. Claire* v. *Cuyler*, 634 F.2d 109 (3d Cir.), *rehearing denied*, 643 F.2d 103 (3d Cir. 1980). Under the *St. Claire* test, which the district court termed "the most restrictive approach" (P.A. 53A), to justify any deprivation of fundamental constitutional rights, regardless of how intrusive, the state need only "produce evidence that to permit the exercise of first amendment rights would create a potential danger to institutional security." *Id.* 114. Such evidence may consist of the expert testimony of prison officials who profess to believe that such a potential danger exists, if the officials' opinions are "held 'sincerely' and [are] arguably correct." *Id.* (citation omitted). Once the state has satisfied its burden under the *St. Claire* analysis, the court

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inmates). "When one faith is more heavily restricted than another, the courts must closely scrutinize the reasonableness of any restrictions." *Native American Council of Tribes* v. *Solem*, 691 F.2d 382, 384 (8th Cir. 1982) (citation omitted); *Cooper* v. *Pate*, 382 F.2d 518, 521-522 (7th Cir. 1967).

By not making provisions for Muslim inmates to worship on their Sabbath, while simultaneously allowing adherents of religions with Saturday or Sunday Sabbaths to worship, petitioners have denied Muslim inmates "a reasonable opportunity of pursuing [their] faith comparable to the opportunit[ies] afforded fellow prisoners who adhere to conventional religious precepts . . ." *Cruz* v. *Beto*, 405 U.S. at 322, and thereby violated the guarantees afforded respondents by the Equal Protection Clause. *See, e.g., Cooper* v. *Pate; Native American Council of Tribes* v. *Solem*. Principles of deference are no more applicable in analyzing respondents' Fourteenth Amendment claim than they are in analyzing respondents' First Amendment challenge.

must defer to the prison officials' judgment unless the inmate shows "by 'substantial evidence . . . that the officials have exaggerated their response' to security considerations . . . or that their beliefs are unreasonable." *Id.* 115 (citations omitted). This "substantial evidence" requirement has been defined by the Third Circuit as establishing an extremely heavy burden, *see, e.g., Cole* v. *Flick*, 758 F.2d 124, 128 n.7 (3d Cir. 1985), heavier than the preponderance of the evidence standard typical in a civil suit. This test is so deferential it provides virtually no protection for the fundamental rights of prisoners.

First, the test fails to offer any consideration of the values underlying the Free Exercise Clause, the rehabilitative and security interests fostered by religious observance, or the prisoners' interest in congregational worship. Second, because of the transcendent constitutional imperatives involved in the deprivation of core free exercise rights, there is no reason why this Court's general Free Exercise principles should not apply both inside and outside of the prison walls. *See, e.g., Goldman* v. *Weinberger*, ___ U.S. ___, 89 L.Ed. at 498-499 (O'Connor J., dissenting); Hutchinson, *Analyzing the Religious Free Exercise Rights of Inmates: The Significance of Pell, Jones and Wolfish*, 11 N.Y.U. REV. OF L. AND SOC. CH., *supra;* Note, *The Religious Rights of the Incarcerated*, 125 UNIV. OF PA. L. REV., *supra*. Third, petitioners' test results in an inmate's fundamental constitutional rights becoming wholly dependent upon each prison official's assessment of the reasonableness of the prison policy. But, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of . . . officials and to establish them as legal principles to be applied by the Courts." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 638. Petitioners' standard leaves the protection of prisoners' rights in the hands of the very people accused of violating them, elevating prison wardens to the guardians of individual rights and liberties.[34]

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[34] "*Sed quis custodet ipsos custodes.*" Juvenal, satires, vi, 1. 347 ("But who will watch the keepers themselves?").

Moreover, merely requiring prison officials to demonstrate that their security concern is sincere and arguably correct and requiring inmates to demonstrate that such a concern is exaggerated, effectively provides no protection for religious worship. Virtually every practice in a prison has some bearing on security concerns, and in the very worst case, any breach in security may have dire consequences. It would be the unimaginative prison official who could not conjure up a potential security interest underlying any particular restriction.

Petitioners' test is wholly inadequate in cases such as this, where the religious practice itself poses no security threat to the institution, but the infringement on religious freedom is a result of general prison policies. Under the *St. Claire* test advocated by petitioners, the general prison policies may be rational, but this ignores the central issue of whether the resulting deprivation on religious observance is justified.

Finally, the *St. Claire* test offers no requirement that any effort be made to determine whether there are means by which both the institution's security concerns and the inmates' religious rights can be accommodated. Indeed, the Solicitor virtually concedes the inadequacy of petitioners' approach when he writes:

> A limited review of available alternatives is particularly appropriate with respect to inmates' free exercise claims, because those claims tend to arise not from prison policies aimed at prohibiting the free exercise of religion, but from necessarily broad prison rules that have the indirect effect of prohibiting an individual from practicing his religion. [S.Br. 24].

However, there is nothing in the *St. Claire* test advocated by petitioners which mandates a consideration of alternatives to ensure that the deprivation imposed upon first amendment freedoms is no more restrictive than necessary.[35]

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[35] Cognizant of the weakness of the proposed standard, the Solicitor cites five lower court opinions as evidence that the minimum rationality test has "teeth." (S. Br. 25-26). However, two of the cited cases adopt a far more stringent standard than advocated by petitioners. *See, e.g., Barrett* v. *Virginia*, 689 F.2d at 502 (adopting the *Martinez* "no broader than necessary" test); *Kincaid* v. *Rusk*, 670 F.2d 737, 744 n.10 (least restrictive alternative approach . . . is helpful where, as here, the alleged institutional objective is unrelated to security and the restriction is overbroad."). Similarly, in the other cases cited by the Solicitor, the court gave far more scrutiny to the asserted governmental interests than *St. Claire* requires. *See Green* v. *Ferrell*, 801 F.2d 765 (5th Cir. 1986); *Mann* v. *Smith*, 796 F.2d 79 (5th Cir. 1986); *Boudin* v. *Thomas*, 533 F.Supp. 786 (S.D. N.Y. 1982). Indeed, this Court has already held that the rational basis test provides too little protection for infringements upon freedom of worship.

> The right of a state to regulate, for example, may include, so far as the due process test is concerned, power to impose all of the restrictions which the legislature may have a 'rational basis' for adopting. But freedom . . . of worship may not be infringed on such slender grounds. [*West Virginia State Board of Education* v. *Barnette*, 319 U.S. at 639].

A brief review of the facts of this case underscore the inadequacy of the protection afforded by the *St. Claire* standard. Thus, it is undisputed that regarding the restriction upon full minimum inmates, security concerns were irrelevant, as inmates returning to the Farm did not have to pass through the gate to enter the Farm, which was a geographically separate, open area. Rather, the district court stressed that "in order for prisoners to be ready to undertake careers in the free society," the restriction was designed to teach full minimum inmates "to work a full, productive day without taking time off from their jobs to pursue personal matters." (P.A. 46A). First of all, there is simply no basis for the claim that adhering to fundamental religious observance in a free society is contrary to engaging in a full, productive day of work. Moreover, at no time have Muslim inmates sought to avoid their work responsibilities. Rather, they simply seek to balance both their obligations to the institution as well as responsibilities to their religious faith. Finally, we know of nothing in either the decisions of this Court or any other court which permits a prison official, purportedly under the guise of rehabilitation, to substitute the goal of uninterrupted productivity for fundamental constitutional rights. To permit such a finding to stand would allow every warden in this country to abridge virtually any constitutional right, simply by declaring that such a guarantee conflicts with

values that the prison warden personally feels should be inculcated.

Similarly, there was no justification for petitioners' prohibition on gang minimum Muslim inmates from attending Jumu'ah. As a threshold matter, since the prohibition on gang minimum inmates attending Jumu'ah occurred as result of the unilateral elimination of the alternate work detail, focusing instead, as both petitioners (P. Br. 30-31) and the Solicitor (S. Br. 28-29) choose to do, on either the New Jersey Classification Standard (Standard 853) or the March 1984 "no-return" policy and their justifications is misplaced.

Second, petitioners' conduct and the facts of the case belie any claim that elimination of the alternate detail was justified. Thus, the record evidence shows that the alternate work detail posed no security problems for the institution or other inmates. The detail itself, which was a mixed detail including non-Muslim prisoners, created no affinity group problems, nor does the record evidence show that the institution presently has any affinity group problems as a result of Muslim congregational worship. Nor is there any evidence that inmates on the detail ever sought to escape rigorous work. Furthermore, there is nothing in Standard 853 which precludes operation of this alternate work detail one day per week, as the detail operated without criticism from the State for eleven months after the promulgation of Standard 853. Even if for some unexplained reason the institution had to convert the alternate wood sawing detail to a maximum detail, the prison's own work records indicate that there are numerous jobs available inside the institution's security perimeter which could be used to employ an alternate work detail and would have permitted Muslim inmates to participate in Jumu'ah worship (J.A. 62-120). Nor was elimination of the alternate work detail justified by prison overcrowding, as prison records show that between August 1983 and April 1984, the population at the main facility declined (J.A. 122-134). Moreover, the alleged problem of institutional overcrowding which justified the elimination of the Friday

alternate work detail and curtailment of Jumu'ah participation, never poses any problems on weekends, when all inmates are confined to the prison, but *all adherents* with Saturday or Sunday Sabbath worship services are entitled to attend without limitation. Rather than justifying petitioners' action, petitioners' own behavior and the record evidence highlight the arbitrary nature of petitioners' conduct.

This concern for First Amendment values is far more than academic. It is rooted in the practical realization that petitioners' lack of sensitivity to prisoners' religious rights in the long run will be counterproductive to the interests of security and rehabilitation which petitioners and their supporters claim they are seeking to advance. If prisoners feel they are arbitrarily being denied so basic a right as participation in a congregational worship service, a right afforded virtually every other inmate in the institution, the inmates are likely to feel emnity and hostility toward the officials enforcing the abridgement of such a basic right.[36] On the other hand, permitting prisoners to observe their religious faith may well enhance the institution's objectives and goals.

Where the institution may balance both security needs and allow religious observance, neither reason nor common sense justifies the failure to make such an accommodation. It was the appreciation of this fact which compelled the lower court to adopt a standard of mutual accommodation and to modify the *St. Claire* minimum rationality test being advocated by petitioners before this Court.

G. Protection Of Prisoners' Free Exercise Rights Will Harm Neither The Courts Nor Prison Administration.

Although it is undisputed that the mutual accommodation standard adopted by the lower court will protect fundamental

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[36] "A person who receives what he considers unfair treatment from correctional authorities is likely to become a difficult subject for reformation." President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Corrections*, 83 (1967).

constitutional rights of inmates, petitioners speculate that this standard will have disastrous consequences on prisons and courts throughout this country. Without any basis or justification, petitioners predict a "parade of horribles" including a flood of litigation, emeshing federal courts in prison administration, potential damage claims stultifying the exercise of prison administrators' professional judgment, and encouraging inmates to recast their complaints as free exercise claims (P. Br. 31-33; S. Br. 20-23). As a threshold matter, these claims, without any documentation or support, are the kind of "[r]outine and automatic arguments . . . made before and have been rejected by this Court." *Cleavinger* v. *Saxner*, 106 S.Ct. at 504; *Johnson* v. *Avery*, 393 U.S. at 486-487; *Lee* v. *Washington*, 390 U.S. at 334. Not "every step taken to protect constitutional rights of prisoners will lead to a breakdown in institutional discipline and security." *Cleavinger* v. *Saxner*, *supra*.

Nor is the fear of frivolous litigation grounds to justify denial of constitutional rights. *See Tower* v. *Glover*, 476 U.S. 914, 922-923 (1984); *Patsy* v. *Florida Board of Regents*, 457 U.S. 496, 512 n.13 (1982).

> Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine. Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the [Free Exercise Clause] [*Hoover* v. *Ronwin*, 466 U.S. 558, 601 (1984) (Stevens, J., dissenting) (footnote omitted).

Moreover, both the *in forma pauperis* proceedings, 28 U.S.C. § 1915 and assessment of even minimal costs against inmates, 28 U.S.C. § 1927, provide effective ways to deter truly baseless litigation. *Accord, Cleavinger* v. *Saxner; Breen* v. *Karl*, 419 F.2d 1034, 1038 (7th Cir. 1969).

Nor will the decision of the lower court encourage inmates to recast their complaints as free exercise claims. First, the lower court's decision does not create a "special standard" for religious claims (S. Br. 22), but seeks to develop a test which is

appropriate for adjudicating free exercise matters. Second, although the Free Exercise Clause receives heightened scrutiny outside of prison, there is no evidence that nonprisoner litigants have recast their constitutional challenges as free exercise challenges to take advantage of this additional protection. Moreover, the Solicitor overlooks the fact that any free exercise claim must demonstrate that the underlying beliefs are sincerely held and religious in nature. *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); *Africa* v. *Commonwealth of Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981), *cert. denied*, 456 U.S. 908 (1982).

Contrary to petitioners' conjecture, adoption of the lower court's mutual accommodation standard will not greatly alter officials' flexibility regarding prison administration. By its terms, the lower court's standard does not unduly interfere with prison affairs, and it has not caused any disruption in prison administration in those jurisdictions where it has already been applied.[37]

Moreover, rather than disrupting penal administration, requiring prison administrators to ensure that their conduct comports with constitutional requirements enhances the quality of decisionmaking:

> Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. As one commentator aptly put it: 'Whatever other concerns should shape a particular official's actions, certainly one of them should be the constitutional rights of individuals who will be affected by his actions. To criticize section 1983 liability because it leads decisionmakers to avoid the infringement of constitutional rights is to criticize one of the statute's raisons

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[37] *See, e.g., Barrett* v. *Virginia*, 689 F.2d at 501-502; *Bradbury* v. *Wainwright*, 718 F.2d at 1543; *Teterud* v. *Burns*, 522 F.2d at 359; *Abdul Wali* v. *Coughlin*, 754 F.2d at 1033.

d'etre. [*Owen* v. *City of Independence*, 445 U.S. 622, 656 (1980) (footnote omitted)].

Adoption of the lower court's standard will protect the rights of inmates without adversely affecting the judicial system or prison administration.[38]

II. PETITIONERS' POLICIES EFFECTIVELY CONDITION VITAL BENEFITS UPON MUSLIM INMATES FOREGOING A CENTRAL TENET OF ISLAMIC OBSERVANCE.

Not only is there no legitimate justification for petitioners' deprivation of respondents' core First Amendment rights, but the state is effectively conditioning vital benefits upon Muslim inmates foregoing a central tenet of Islamic observance.

This Court has unequivocally held that the state may not require an individual "to choose between following the precepts of [his] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [his] religion in order to accept work, on the other hand." *Sherbert* v. *Verner*, 374 U.S. at 404. For,

> [w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise

[38] It is also true that "the cost of protecting a constitutional right cannot justify a total denial." *Bounds* v. *Smith*, 430 U.S. at 825. Fiscal and budgetary considerations are insufficient to justify the denial of constitutional rights. *See, e.g., Jackson* v. *Bishop*, 404 F.2d 571 580 (8th Cir. 1968).

Petitioners also imply that the lower court's standard will discourage state prisons from adopting experimental initiatives like the outside work program at Leesburg (P. Br. 35). Contrary to petitioners' claim, there is little that is novel or experimental about Leesburg's outside work program. As early as the 1820's, the Auburn Prison in New York commenced a profitmaking work program. Singer and Statsky, RIGHTS OF THE IMPRISONED, *supra* at 4.

> is nonetheless substantial. [*Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718)].

But that is precisely the effect of petitioners' policies in this case. It is undisputed that if Muslim inmates failed to report to work on Friday in order to attend Jumu'ah, the inmate would be disciplined for misconduct. (Tr. 112-113; 174). Moreover, successful completion of an outside work assignment in both gang minimum and full minimum is a prerequisite for release (J.A. 147), and a Muslim inmate may not remain in maximum custody status to attend Jumu'ah (Tr. 177). Thus, petitioners' policies effectively compel Muslim inmates by threat of sanction, to refrain from religiously motivated conduct, and condition release from custody, upon Muslim prisoners' willingness to forego a central observance of their faith. Petitioners' actions are no different than the conduct proscribed by this Court in *Sherbert* v. *Verner*, 374 U.S. at 404-406 and in *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. at 717-718.

Nor can New Jersey save its conduct from constitutional infirmity on the ground that either work assignments or a lower inmate classification is merely a privilege and not a right.

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege. [*Sherbert* v. *Verner, supra*, 374 U.S. at 404 (and cases cited therein)].

To condition the availability of benefits even to the imprisoned, upon an inmate's "willingness to violate a cardinal principle of [his] religious faith effectively penalizes the free exercise of [his] constitutional liberties." *Id.* 406.

Furthermore, petitioners' conduct is not wholly neutral, but affirmatively compels respondents, "by threat of sanctions to refrain from religiously motivated conduct [and] to engage in conduct that they find objectionable for religious reasons." *Bowen* v. *Roy*, ___ U.S. ___, 90 L.Ed.2d 735, 747 (1986) (footnotes omitted). Under these circumstances, petitioners'

conduct cannot be squared with the fundamental values underlying the Free Exercise Clause.

CONCLUSION

Petitioners would replace the substantial and proper judicial deference displayed by the Third Circuit with an irrebuttable presumption in favor of the reasonableness of prison practice. Under the test advanced by petitioners, a policy of judicial abdication would be substituted for judicial deference, and the wardens of our prisons would be elevated to the guardians of inmates' fundamental constitutional rights and liberties. Neither the decision of the court below, the constitutional jurisprudence of this Court, nor the compelling facts of this case warrant such an untoward result.

For all of the foregoing reasons, respondents respectfully request that this Court affirm the judgment of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

U.S. Department of Justice
Federal Bureau of Prisons

Washington, D.C. 20534

December 30, 1986

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41 South Haddon Avenue
Haddonfield, New Jersey 08033

This is in reply to your letter of December 3, 1986, in which you request a description of how Islamic inmates in the Federal Bureau of Prisons are facilitated to observe the weekly Jumu-ah service.

Provision is made, by policy, in all Bureau facilities for the observace of Jumu-ah by all inmates in general population who wish to keep this faith practice. The service is held each Friday afternoon in the general time frame that corresponds to the requirements of the Islamic jurisprudence. This time is seasonaly adjusted to compensate for day-light savings regulations where applicable.

Subject only to restraints of security and good order in the institution all routine and normal work assignments are suspended for the Islamic inmates to ensure freedom to attend such services. Islamic inmates are not released from work if they are not attending the Jumu-ah service.

In those institutions where the outside work details contain Islamic inmates, they are permitted access to the inside of the institution to attend the Jumu-ah.

While there is an aspect of disruption to the work routines on occasion, the Bureau of Prisons feels that the necessity for equal opportunity to practice one's religious faith takes priority on this one day of the week. This is, of course, in the absence of any threat to the security of the institution.

This pro-active stance toward freedom to practice the religious

faith of choice is based on the equal treatment concept of the first (and preferred) amendment.

Enclosed please find a copy of your Program Statement on Religious Beliefs and Practices for your information.

Sincerely,

/s/CHARLES R. RIGGS
CHARLES R. RIGGS
Chaplain Director

U.S. Department of Justice
Federal Bureau of Prisons

Program Statement

OPI : CORR
Number : 5360.5
Date : December 14, 1984
Subject : RELIGIOUS BELIEFS AND PRACTICES OF COMMITTED OFFENDERS

EFFECTIVE DATE: January 14, 1985

1. [PURPOSE AND SCOPE § 548.10.*

a. The Bureau of Prisons provides inmates of all religious faiths with reasonable and equitable opportunities to pursue individual religious beliefs and practices, within the constraints of budgetary limitations and the security and orderly running of the institution and the Bureau of Prisons.

b. When it is considered necessary for the security or good order of the institution, the Warden may limit attendance at or discontinue completely a religious activity. The Warden may not restrict nor allow the religious group itself to restrict attendance at or participation in a religious activity on the basis of race, color, nationality, or (ordinarily) creed. The Warden, after consulting with the institution chaplain, may limit participation in a religious activity to the members of that religious group when the nature of the religious activity (e.g., a ceremonial meal) suggests a need for this limitation.

c. The Bureau of Prisons' rule on religious beliefs and practices does not require an inmate to profess a religious belief. An inmate may designate any or no religious preference. An inmate may change this designation at any time.]

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*[Bracketed Italics—Rules]
Regular Type—Implementing Information

It is conceivable that an inmate could show a pattern of changing religious preference immediately preceding the occurrence of a faith group's scheduled religious activity. To prevent this specific abuse, the Warden, in consultation with the chaplain, may exclude an inmate from participating in that activity. A report specifying the reasons for such exclusion should be placed in the inmate central file.

2. DIRECTIVES AFFECTED.

a. Directive Superseded.

P.S. 5360.4, Religious Beliefs and Practices of Committed Offenders.

b. Directives Referenced.

P.S. 5580.2, Inmate Personal Property.

P.S. 5266.4, Incoming Publications.

P.S. 5500.1, Custodial (Correctional Services) Manual.

c. Rules cited in this statement are contained in 28 CFR 548.10-15.

d. 42 U.S.C. 1996, Protection and Preservation of Traditional Religions of Native Americans.

3. STANDARDS REFERENCED.

a. Commission on Accreditation for Corrections Standards for Adult Correctional Institutions (2nd Edition) -2-4242, 2-4334, 2-4463, 2-4466, 2-4468, 2-4470, 2-4471.

b. Department of Justice Federal Standards for Prisons and Jails—1.08, 1.10, 4.06, 15.01, 15.02, 15.03.

4. [DEFINITION § 548.11—*For purposes of this rule, the term "religious activity" includes religious diets, services, ceremonies, and meetings.*

5. PROCEDURES § 548.12.

a. Institution chaplains are available upon request to provide pastoral care and counseling.

b. Under the general supervision of the Warden, institution chaplains shall schedule and coordinate the institution's religious activities. If an institution has no staff chaplain, a staff member designated by the Warden shall exercise the authority of the chaplain under this paragraph b.]

In the scheduling of approved religious activities, both the availability of staff supervision and the need to proportionately share the time and space available among the eligible groups must be considered.

[*c. Institution staff may contract with representatives of faith groups in the community and are encouraged to accept the services of volunteers to assist inmates in the pursuit of their religious beliefs.*]

The term "representatives of faith groups" includes both clergy and spiritual advisers. The Warden or designee (ordinarily the chaplain) may require a recognized representative of the faith group to verify the adviser's status prior to approving the person's entry into the institution.

[*d. No one may disparage the religious beliefs of an inmate, nor coerce or harass an inmate to change religious affiliation.*

e. Attendance at all religious activities is voluntary.

f. An inmate ordinarily shall be allowed to wear or use personal religious items during devotional services. Upon request of the inmate, the Warden may also allow an inmate to wear or use personal religious items within the institution. The Warden's decision on whether an inmate may wear or use personal religious items during devotional services and/or within the institution shall be based on considerations of security, safety, and good order. If the Warden determines that wearing or using the religious items within the institution would violate considerations of security, safety, or good order, the Warden may nonetheless permit the inmate to wear or use the religious items during devotional services. The Warden may request the institution chaplain to obtain a determination

from representatives of the inmate's faith group and/or other appropriate sources concerning the religious significance of the items.]

The term "personal religious items" refers to such items as robes, prayer shawls, prayer rugs, medicine pouches, religious headbands, kufis, yarmulkes, beads, phylacteries, and medallions. The wearing of religious headgear such as a kufi, a headband, or a yarmulke is ordinarily permitted within the institution. Secure storage space will be provided for a religious item that may not be worn or used within the institution, based on considerations of security, safety, or good order, but which may be worn or used during devotional services.

[*g. Each inmate who wishes to have religious books, publications, or materials must comply with the general rules of the institution regarding ordering, purchasing, retaining and accumulating personal property. Literature, publications or books about religion or religious teaching are permitted in accordance with the procedures governing incoming publications (Part 540, Subpart F).*]

Part 540, Supart F refers to Program Statement 5266.4, Incoming Publications. A reasonable portion of the budget of the chaplains should be used to equitably provide a variety of religious literature.

6. [DIET § 548.13.

a. An inmate who wishes to observe religious dietary laws will be provided a diet which meets or exceeds recommended daily allowances established by the Food and Nutrition Board of the National Research Council, National Academy of Sciences, and which complies with religious dietary laws to the extent practicable within the constraints of budget limitations and the security and orderly running of the institution and the Bureau of Prisons.]

The Bureau of Prisons provides inmates desiring a religious diet reasonable and equitable opportunities to observe religious dietary laws within the constraints of budget limita-

tions and the security and orderly running of Bureau of Prisons institutions.

[*b. As a once-a-year accommodation, staff may make arrangements with an inmate religious group to have a ceremonial meal. If the inmates representing the organization request, staff may purchase from a food supplier specially prepared food items which meet religious requirements. The inmate religious group is to include with its request information on the religious significance of the items. The Warden may request the institution chaplain to obtain a determination from representatives of the inmate's faith group and/or other appropriate sources on the religious significance of the items. Funds for the purchase of special food items may be provided from:*

(1) Funds from the chaplain's budget; or

(2) Funds provided by community organizations.]

Food items for this meal are arranged through the institution food service department. Where warranted by the religious significance of the occasion, the Warden may also make arrangements for the inmate to observe a day of work proscription (see paragraph 8 of this Program Statement).

7. [INSTITUTION WORK ASSIGNMENT § 548.14.
Except where necessary for maintaining security, safety, and good order in the institution, an inmate may not be given a work assignment which violates the specific requirements of that inmate's religious faith. The inmate must initiate the request for a different work assignment.]

For example, an inmate whose religious teachings prohibit the handling of pork should not be assigned to a position requiring the inmate to prepare, serve, or handle pork or pork products.

The specific religious requirements will be verified by a chaplain or an appropriate religious consultant.

8. [SECHEDULING TO OBSERVE RELIGIOUS HOLIDAYS, CELEBRATIONS, AND ACTIVITIES § 548.15.

a. Consistent with maintaining security, safety, and good order in the institution, the Warden shall endeavor to facilitate the observance of important religious holidays or celebrations in accordance with specific requirements of a faith group, such as fasting, worship, diet, or work proscription. The inmate must initiate a request for observance of a religious holiday or celebration, and must specify in this request the nature of the observance and the particular accommodation requested. The Warden may request the institution chaplain to verify the specified religious requirements with representatives of the inmate's faith group and/or other appropriate sources.

Consistent with maintaining security, safety, and good order in the institution, the Warden is ordinarily to allow an inmate to take non-consecutive vacation days, or to make-up for missed work, or to change work assignments in order to facilitate the inmate's observance of a religious holidfay or celebration.

b. The Warden may relieve an inmate from an institution program or assignment if a religious activity is also scheduled at that time.]

The more central the religious activity is to the tenets of the inmate's religious faith, the greater the presumption is for relieving the inmate from the institution program or assignment. Where appropriate, the Warden may consult with the chaplain concerning a faith group's religious tenets.

/s/NORMAN A. CARLSON
NORMAL A. CARLSON
Director